JD–05–08
Grand Rapids, MN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

EICHORN MOTORS, INC.

and

Cases 18–CA–18226
18–CA–18256
18–CA–18276
18–CA–18333

UNITED AUTOMOBILE WORKERS
INTERNATIONAL UNION

Kristyn A. Myers and *David M. Biggar, Esqs.,*
for the General Counsel.
R. Thomas Torgerson, Esq. (Hanft, Fride, P.A.),
of Duluth, Minnesota, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried before me in Grand Rapids, Minnesota, from April 24 through 26, 2007. The original charge in Case 18–CA–18226 was filed by the United Automobile Workers International Union (the Union) on December 8, 2006, [1] against Eichorn Motors, Inc. (the Respondent). That charge was amended on December 14, 2006, and January 24, 2007. The charge in Case 18–CA–18256 was filed by the Union on December 28, 2006. The original charge in Case 18–CA–18276 was filed by the Union on January 12, 2007, and amended on February 20, 2007. On February 23, 2007, the Regional Director for Region 18 of the National Labor Relations Board (the Board), issued an order consolidating cases, consolidated complaint, and notice of hearing. Thereafter, on March 6, 2007, the Union filed the charge in Case 18–CA–18333. On March 23, 2007, the Regional Director for Region 18, issued an order further consolidating cases and amended consolidated complaint.

The amended consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: threatening employees that they would not be paid for the Thanksgiving holiday if they wished to be paid the Union way; threatening an employee that the employee had to choose the Union way or the Eichorn way; threatening to discharge an employee if the employee continued to support the Union; promising an employee

[1] All dates are in 2006, unless otherwise indicated.

improved terms and conditions of employment if the employee rejected the Union as the employee's bargaining representative; threatening an employee that the employee's lawful union activity showed that the employee was going the Union way; telling an employee that it would be futile to select the Union as the employee's bargaining representative and threatening that employee that the Union might win the battle but is not going to win the war; threatening an employee by telling the employee that the Respondent wanted team players, thereby indicating that being a union supporter is inconsistent with employment with the Respondent. The amended consolidated complaint further alleges that the Respondent violated Section 8(a)(3), (4), and (1) of the Act by: refusing to give turkey gift certificates to employees James Ossefoort, David Cogger, Robert Anderson, and Donald Conrad; systematically disciplining employees James Ossefoort and David Cogger; and discharging employees James Ossefoort, David Cogger, and Robert Anderson because the Union filed charges on their behalf with the Board; because of their union activity, and because they gave testimony under the Act. The amended consolidated complaint also alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by: unilaterally altering its wage policy; unilaterally changing its holiday pay policy; unilaterally implementing a customer service index/service satisfaction policy under which unit employees may be discharged for failing to reach zone average scores, and discharging employees James Ossefoort, David Cogger, and Robert Anderson and pursuant to that unlawfully implemented policy; changing its training pay policy to eliminate double time for training unit employees; bypassing the Union and dealing directly with employees in the unit on two occasions.

In addition to the traditional Board remedies the General Counsel seeks a broad cease-and-desist order and an order requiring that the notice to employees be read to the assembled employees by Michael Coombe the Respondent's general manager, or an agent of the Board.

The Respondent filed a timely answer to the amended consolidated complaint denying the essential allegations and requesting that the complaint be dismissed.

On the entire record, including my credibility determinations based on the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and inferences drawn from the record as a whole and, after considering the briefs filed by the Respondent and the General Counsel,[2] I make the following

Findings of Fact

I. JURISDICTION

The Respondent, a corporation, operates a retail automobile dealership and has engaged in the sales and service of new and used automobiles at its facility in Grand Rapids, Minnesota. Based on its operations since May 1, 2006, the Respondent, in conducting its business operations will annually purchase and receive at its facility goods and materials valued in excess of $50,000 directly from points outside the State of Minnesota, and will annually derive gross revenue in excess of $500,000 from the sale of goods and services. The Respondent admits, and I find, that

[2] The General Counsel's unopposed request to insert "not" between "was" and "the" on p. 181, L. 7 and to correct "about" to "above" on p. 349, L. 10 of the transcript is granted.

it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

This case is a sequel to the decision issued by Administrative Law Judge (ALJ) Paul Bogus on March 14, 2007. No exception was taken to that decision and it was adopted by the Board on April 30, 2007, Case 18–CA–18084 (not reported in Board volumes) (*Eichorn I*). Judge Bogas found that the Respondent was "an admitted successor to employer Swanson Motors." The record herein supports that finding. The Respondent succeeded to the ownership of Swanson on May 1, 2006.

The Respondent's parts and services department consists of several job categories. Service technicians (technicians or mechanics), diagnose and repair the vehicles. The lube technician lubes the vehicle, changes the oil, flushes the vehicle fluids, and rotates the tires. The car washer is just that, and the parts employees are responsible for ordering the parts. Service advisors (service writers or service consultants), maintain the daily schedule and function as the intermediary between the customer and the service technicians. The service department performs work that is covered by a GM warranty and as well as work that is not.

Justin Eichorn (J. Eichorn) is the Respondent's president and majority stockholder. Mitchell Eichorn (M. Eichorn) is his father and the Respondent's vice president and a corporate officer. He funded 40 to 45 percent of the purchase price. In addition to funding the purchase price, from the fall of 2005 until the closing of the sale, M. Eichorn was immersed in discussions, meetings, and reviewing documents pertaining to the purchase of the dealership. Thereafter, from May 2006 to January 2007, he physically remodeled the sales floor and the office "to help improve the business." M. Eichorn received no payment for his 7 months of work. Judge Bogas found that the Eichorns "testified that at the time they executed the purchase of sale agreement they intended, and believed, that the labor contract between the Union and Swanson would no longer apply once the Respondent began operating the facility." *Eichorn I,* JD slip op. at 3 (footnote omitted). This finding was affirmed by M. Eichorn at the hearing.

Ossefoort testified that he knew that M. Eichorn was the father of J. Eichorn. He testified that he might have seen M. Eichorn at the dealership from the day the Respondent took possession. Thereafter, he saw M. Eichorn remodeling the showroom at the dealership "pretty much every day." He also witnessed M. Eichorn having discussions with various, unknown individuals, in the office of J. Eichorn and the office of Michael Coombe. Coombe is the Respondent's general manager and minority stockholder. Cogger testified that he also saw M. Eichorn walk through the shop at the dealership before the purchase. Thereafter, he observed M. Eichorn remodeling the showroom, the offices, and the bathrooms. He testified that before his discharge he saw M. Eichorn at the dealership "nearly every day." Anderson testified that shortly after the sale M. Eichorn came to the back of the shop, introduced himself, and asked Anderson what improvements were needed in the shop. M. Eichorn also told Anderson that he was hoping that in the future "they" could have some kind of a 401(k) in place and vacation time.

The foregoing testimony is not disputed. M. Eichorn's status as an agent of the Respondent is disputed. The General Counsel contends that he is an agent and as such violated Section 8(a)(1) by threatening Anderson with discharge if he continued to support the Union and 8(a)(5) by bypassing the Union and dealing directly with Anderson regarding his terms and conditions of employment. Those issues are addressed below.

The record clearly establishes that Michael Coombe, the Respondent's general manager, and David Brown, its parts and services director, are supervisors within the meaning of Section 2(11) and agents within the meaning of 2(13) of the Act, as alleged in paragraph 4(a) of the amended consolidated complaint. In addition to being the general manager Coombe is also a minority stockholder. Coombe is responsible for the operation of the dealership, makes the daily business decisions, including hiring and firing, and reports to no one. James Walberg was the parts and services director for Swanson for 12 years and functioned in that capacity for the Respondent until he retired on July 21, 2006. Brown replaced Walberg. Brown admits that he hires and disciplines employees. He also admits effectively recommending the discharge of employees and making decisions affecting employees' wages. I find that Coombe and Brown are supervisors and agents as alleged in the complaint.

The Union was the collective-bargaining representative of the Swanson unit employees for approximately 18 years before the Respondent purchased the dealership. The most recent collective-bargaining agreement between Swanson and the Union was effective from July 1, 2004 to July 1, 2007. Since May 1, 2006, the date the Respondent succeeded to the ownership of Swanson, the Union has been the designated exclusive collective-bargaining representative of the employees in the appropriate bargaining unit. I find that the appropriate bargaining unit is:

> All full-time and regular part-time automobile mechanics, parts-men, washers, polishers, and new/used car prep employees employed by Eichorn Motors, Inc., at its Grand Rapids, Minnesota facility; excluding shop foreman, superintendents, office help, salesmen, guards and supervisors as defined in the National Labor Relations Act, as amended.

See *Eichorn I,* slip op. at 20. There being no contrary record evidence, I find that paragraph 7 of the amended consolidated complaint is proven.

Although the Respondent did not execute or assume the Swanson collective-bargaining agreement it and the Union held approximately 4 bargaining sessions in the fall of 2006. International Representative George Klingfus and Local President Tim Thompson represented the Union. Ossefoort and Cogger attended three of the bargaining sessions and Anderson two on behalf of the Union. Coombe and Brown represented the Respondent at the bargaining sessions. The meetings did not result in a collective-bargaining agreement. Also during this timeframe the Union filed various charges against the Respondent. Those charges became the basis for the November 14 hearing before Judge Bogas. Ossefoort, Cogger, Anderson, and employee Donald Conrad testified at the trial on behalf of the General Counsel.

Judge Bogas issued his decision on March 14, 2007, finding that the Respondent violated Section 8(a)(1) of the Act when: (1) Coombe, in remarks to Ossefoort during the first week in August 2006, promised to grant employees a raise in exchange for their withdrawal of support for the Union; (2) in early August Coombe created the impression of surveillance by telling Ossefoort that Anderson was the "ramrod" behind the Union; (3) on August 10 Coombe

coercively interrogated Cogger about his support for the Union; (4) on August 11, Coombe threatened to discharge Anderson because of his support for the Union; (5) on September 13, in a conversation with Ossefoort, Coombe again promised that if the employees dropped the Union he would grant them a raise and this time also offered backpay and the possibility of improved benefits; (6) from early August through September 1, Coombe and Brown repeatedly solicited Ossefoort to campaign against continued union representation; (7) on September 13, Coombe interrogated Ossefoort about his support for the Union; (8) in September, in a conversation with Ossefoort, Coombe threatened that he would discharge the service technicians because of their support of the Union; (9) in October, Coombe interrogated Conrad about his support for the Union; and (10) in October, Coombe interrogated Conrad about whether he had received a subpoena to appear at the unfair labor practice hearing and if he knew of anyone else who had been subpoenaed. *Eichorn I,* JD slip op. at 9–14.

Although Judge Bogas concluded that the Respondent did not consent to assume the Swanson collective-bargaining agreement he still found that the Respondent violated Section 8(a)(1) and (5) of the Act by: (1) beginning on about June 1, 2006, the Respondent failed and refused to recognize and bargain in good faith with the Union; and (2) on September 13, Coombe bypassed the Union and dealt directly with Ossefoort regarding terms and conditions of employment. Id., at JD slip op. 17–18. Additionally, Judge Bogas ordered the Respondent to bargain in good faith with the Union because he found that "even after the Respondent declared that it was willing to negotiate in good faith with the Union, and began meeting with it, the Respondent engaged in multiple activities to unlawfully undermine the Union's role as collective bargaining representative." Id., at JD slip op. at 18. On about March 22, 2007, the Union again requested bargaining and the parties scheduled bargaining sessions for May 2007. The Respondent took no exception to Judge Bogas' decision and it was adopted by the Board on April 30, 2007.

Based on the foregoing the General Counsel submits that paragraphs 8, 9, and 10 of the amended consolidated complaint are proved. I agree. Paragraph 8 alleges that the Respondent admitted and ALJ Bogas found, that since May 1, 2006, that the Union has been the designated exclusive collective-bargaining representative of the unit set forth above. Paragraph 9 alleges that since May 1, 2006, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Respondent's employees in the unit. Paragraph 10 alleges that at all material times the Union has requested that the Respondent recognize it as the exclusive collective-bargaining representative of the unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit (GC Exh. 19, Tr. 94–97).

B. M. Eichorn's Alleged Unlawful Statements

The Union began informational bannering on November 14, the first day of the *Eichorn I* hearing, and continued during the proceeding herein. While employed by the Respondent Ossefoort, Cogger, and Anderson regularly engaged in bannering during their lunchbreaks and on Saturdays. They walked back and forth on the sidewalk carrying signs asking motorists to "honk" in support of the Union. Technician Wade Eckert participated once or twice, for about 15 minutes each time, but he did not carry a sign. No other employees engaged in bannering.

The conversation in which it is alleged that M. Eichorn made unlawful statements happened on December 9. The incident that follows occurred on the last Saturday in November.

The General Counsel submits that this conversation, as reported by Anderson, is consistent with Anderson's testimony regarding the December 9 incident. The General Counsel contends that Anderson's consistent testimony is one of several reasons his testimony regarding the December 9 conversation should be credited.

M. Eichorn stopped his truck next to Cogger and Anderson as they were bannering on the last Saturday in November. The time was between 9 and 10 a.m. Cogger did not partake in the conversation and remembered little of it. He did recall M. Eichorn saying that they were hurting his business. Anderson testified that M. Eichorn asked what they were doing. After being told, M. Eichorn said that because he "wasn't found guilty of anything [] he didn't think it [the informational bannering] was fair to him." He asked that they "give him a chance and wait for [ALJ Bogas'] decision" because he couldn't do anything until [ALJ Bogas] made his decision." Anderson challenged that assertion and told M. Eichorn that he could negotiate. Cogger estimated that M. Eichorn was there for a half to three quarters of an hour. Anderson estimated about a half hour.

M. Eichorn testified that he asked Cogger and Anderson what was going on and that the conversation lasted only a couple of minutes. He remembered them telling him that he needed to negotiate with the Union. He stated that "I didn't know what was going on between Mike Coombe and the Union at that time. I had no idea." He also stated that he had been told by Coombe not to communicate with any unit employees.

Anderson had the demeanor of a truthful witness. His recollection was excellent and he testified in a forthright manner. He was not cross-examined regarding this testimony nor has the Respondent addressed this conversation in its brief. Other than the discrepancy as to the length of the conversation, M. Eichorn does not specifically dispute Anderson's testimony. M. Eichorn's lack of recollection concerning the conversation was evident from the beginning of the questioning by the Respondent's counsel. It took counsel several attempts, and a very leading question, to get M. Eichorn to have any recall of the incident. I find that Anderson is a more reliable witness and I fully credit his testimony regarding this conversation.

Anderson and Local Union President Tim Thompson were bannering on December 9 when M. Eichorn walked over from the dealership. Anderson testified that M. Eichorn approached him and said that he thought that they had an understanding that the men would not "be out there until [ALJ Bogas] issued his decision." Anderson remained silent, and M. Eichorn continued to speak. He told Anderson that he wanted Anderson to work for him because he knew he could fix cars, but that he did not want the Union. He assured Anderson that within a couple of days he would give him a 4-year contract that would provide higher wages than the union contract and be "all around better than the union contract." M. Eichorn told Anderson that Ossefoort and Cogger would get the same contract.

M. Eichorn also told Anderson that he wanted him to choose between the Eichorn way and the Union way and that Anderson's bannering demonstrated that he was for the Union way. M. Eichorn said that if Anderson decided to go the Union way he would not be working for Eichorn Motors. Anderson's only response was that he "was not going to make a decision right then and there out on the sidewalk." During cross-examination Anderson acknowledged that M. Eichorn told him that he was not speaking on behalf of Eichorn Motors and that M. Eichorn

stated that "he was the banker, and that he had the right to come out there and talk to me that way, just like I had the right to be out there bannering."

Thompson testified that he was approximately 2 to 3 feet behind M. Eichorn but that he did not hear everything he said because of the noise from the many motorists that were honking their horns as they drove by. After talking to Anderson for approximately 5 to 10 minutes M. Eichorn turned towards Thompson and asked him to identify himself. Thereafter, he turned his back to Thompson and continued talking to Anderson. Thompson heard M. Eichorn tell Anderson that he thought that they had discussed the bannering and that Anderson "wasn't going to do this." M. Eichorn mentioned that it was hurting "our" business. He also heard M. Eichorn say that he was working on something "now" and that he was prepared to offer "you guys" a 4-year contract "with better benefits and better pay than what the union will get you."

M. Eichorn testified that he talked directly to Anderson and that the conversation lasted for a minute or two. M. Eichorn admits that the Union's bannering caused him to be "emotionally charged," because he felt it was hurting the business. He conveyed this to Anderson by stating, "you are hurting the business, and there's 23 other people inside [the dealership] that want and appreciate their jobs." When asked by Respondent's counsel if he (M. Eichorn) said anything else, M. Eichorn said "No" but then, without a pending question, added "except, you know, his response to me was 'well why don't you negotiate'—something about negotiating with the union." M. Eichorn knew that Coombe was 'in the middle of that" so he then "just walked away pretty much in tears." This time counsel asked if he recalled anything else said by anyone else and he said "No."

The General Counsel stresses that Anderson and Thompson testified that M. Eichorn initiated the dialogue by referencing Anderson's alleged agreement to stop bannering. Thompson also heard M. Eichorn offer Anderson better wages and benefits than could be obtained by the Union. Thompson also corroborated Anderson's recollection of the time of day and the length of the conversation. I agree with the reasons advanced by the General Counsel for finding Anderson a very credible witness. I have found that Anderson had a truthful demeanor, and I have the utmost confidence in the veracity of his testimony. In contrast to M. Eichorn's testimony, Anderson demonstrated excellent recollection of the conversations and gave responsive answers to the questions posed by the attorneys of both parties. The General Counsel also correctly observes that M. Eichorn never directly denied any of the statements Anderson attributed to him. Once again M. Eichorn's testimony was nothing more than a general denial of recollection which "hardly qualifies as a refutation of . . . positive testimony and unquestionably was not enough to create an issue of fact between" Anderson and M. Eichorn. *Altorfer Machinery Co.,* 332 NLRB 130, 137–138 (2000), quoting *Roadway Express, Inc. v. NLRB,* 647 F.2d 415,425 (4th Cir. 1981). The Respondent does not argue otherwise.

The Respondent, in its answer in essence denies paragraph 4(b) of the amended consolidated complaint that alleges that at all material times, M. Eichorn has been the Respondent's vice president and an agent of the Respondent within the meaning of Section 2(13) of the Act. In this regard the Respondent offers that M. Eichorn's statements to Anderson that are alleged to be unlawful were made after he told Anderson that he was not speaking on behalf of Eichorn Motors and that both conversations occurred after Coombe had told M. Eichorn not to communicate with unit employees. (R. Br. at 40.)

1. Agency status of M. Eichorn

The burden of proving any type of agency relationship is on the party asserting the relationship. *Millard Processing Services,* 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994). Accordingly, the General Counsel contends that it is well-established Board law that the test for agency is "whether under all the circumstances employees would reasonably believe that the alleged agent was acting on behalf of management." E.g., *California Gas Transport, Inc.,* 347 NLRB No. 118, slip op. at 4 (2006), enfd. 507 F.3d 847 (5th Cir. 2007). Moreover, "elected or appointed officials of an organization are presumed to be agents of that organization clothed with apparent authority. *Nemacolin County Club,* 291 NLRB 456, 458 (1988), enfd. 879 F.2d 858 (3d Cir. 1989). *Merrill Iron & Steel,* 335 NLRB 171, 173 (2001), quoting *House Calls, Inc.,* 304 NLRB 311 (1991).

M. Eichorn is the Respondent's vice president and a corporate officer. Notwithstanding his title and position he avers that he has neither duties nor day-to-day responsibilities at the dealership. There is no evidence any employee knew of M. Eichorn's lack of day-to-day responsibilities. A least some employees knew he was the father of the Respondent's president, and he told Anderson that he was the financial backer of the enterprise. He was an active participant in the negotiations to purchase the dealership. He testified in *Eichorn I* about the Respondent's intent regarding the assumption of Swanson's collective-bargaining agreement with the Union. *Eichorn I,* JD slip op. at 2–3.

M. Eichorn did much more than show up at the dealership, on an almost daily basis, for 7 months. He was actually making structural improvements to the dealership in order to improve the business. M. Eichorn engaged in this work apparently on his own initiative and without remuneration. It is undisputed that Ossefoort, Cogger, and Anderson, saw him at the dealership almost daily. He clearly had free rein to move at will about the dealership. He used the offices of the president and the general manager for conversations that he held with other individuals. Anderson also observed him attending a meeting in Coombe's office with the management triumvirate of Coombe, Brown, and J. Eichorn. The initial conversation that M. Eichorn had with Anderson is especially telling of his authority within the Respondent's hierarchy. Anderson's testimony, on which the following findings are based, was not subject to cross-examination, was not disputed or refuted by any witness, nor was it addressed in the Respondent's brief. Thus, it is uncontested and I find it, as I do all his testimony, to be credible. Anderson testified that shortly after the purchase of the dealership, M. Eichorn, walked to the rear of the repair shop and introduced himself to Anderson. He asked Anderson to make recommendations regarding needed improvements in the operation of the shop. Thereafter, M. Eichorn expressed his hope "that in the future that they could have some kind of a 401(k) in place and vacation time."

Based on that undisputed conversation alone it would certainly be reasonable for an employee to believe that M. Eichorn was reflecting company policy and speaking and acting for management, and that he had the authority to implement change, or at the least had access to those who had the authority. See generally, *Alberton's Inc.,* 344 NLRB 1172 (2005). It is also reasonable to conclude that such a belief would be reinforced by the statement made by M. Eichorn when he spoke to Cogger and Anderson while they were bannering. Both Cogger's and Anderson's testimony reflects that M. Eichorn spoke of himself and the Respondent as one.

Cogger recalls M. Eichorn initially saying that the bannering was hurting "his" business. Likewise, M. Eichorn told Anderson that "he" had not been found guilty, that the bannering was not fair to "him" and to give "him" a chance, because "he" could not do anything until after the judge decided the case.

In view of the foregoing and in light of the third undisputed conversation set forth above, M. Eichorn's bald assertion that he was not speaking on behalf of Eichorn Motors and that "he was the banker," falls far short of an effective declaration that would dispel the reasonable belief of employees that M. Eichorn was acting on the Respondent's behalf. Moreover, his declaration makes his offer inane. If not speaking for the Respondent, on whose behalf was M. Eichorn preparing a contract that was "all around better than the union contract." Announcing that he was the Respondent's "banker" (financial backer), would only affirm and enhance his authority. Who better to cut a deal with than the individual who controls the purse strings. The record contains no evidence that any employee was aware of any directive issued to M. Eichorn, by anyone, that limited or restricted M. Eichorn's actual and/or apparent authority at all.

The General Counsel also correctly observes that M. Eichorn's statements are consistent with, and a continuation of, a pattern that began shortly after the purchase of the dealership. Thus, promises of improved benefits for rejecting the Union, and threatening discharge for continuing to support the Union were violations found by Judge Bogas in *Eichorn I.* Indeed, it was only in August 2006, that General Manager Coombe was found by Judge Bogas to have threatened Anderson with discharge because of his support of the Union. Id., JD slip op. at 9–11. *Pan-Oston Co.,* 336 NLRB 305, 306 (2001) (Although not dispositive statements made by an alleged agent consistent with statements made by the employer support a finding of apparent authority).

2. Discussion

Based on all of the foregoing, I find that the General Counsel has established that M. Eichorn is an agent of the Respondent within the meaning of Section 2(11) of the Act. I further find that M. Eichorn was acting as the Respondent's agent when he violated the Act as set forth below.

As alleged in the complaint I find that the Respondent violated Section 8(a)(1) of the Act by: interfering with Anderson's Section 7 rights when M. Eichorn told Anderson that "he wanted Anderson to work for him but not the union" and "that he wanted Anderson to choose between the Eichorn way and the Union way." By telling Anderson that bannering was showing M. Eichorn that Anderson was for the Union way he was interfering with Anderson's Section 7 right to engage in protected activity, e.g., *Management Consulting, Inc.,* 349 NLRB No. 27, slip op. at 1 (2007). By threatening Anderson with discharge if he decided to "go the union way," and by making an unlawful promise of benefits when M. Eichorn promised Anderson increased wages and an employment contract that was "all around better than the union contract, M. Eichorn continued to violate Section 8(a)(1). E.g., *Michigan Road Maintenance Co., LLC,* 344 NLRB 617, 622 (2005); *California Gas Transport,* above, slip op. at 6.

The Respondent additionally violated Section 8(a)(5) of the Act by dealing directly with Anderson when M. Eichorn told Anderson that he would offer him an employment contract regarding his terms and conditions of employment, to the exclusion of the Union. The fact that

the offer was prospective is irrelevant, because the offer is still likely to erode the Union's position as the exclusive bargaining representative. E.g., *Allied-Signal, Inc.,* 307 NLRB 752, 753 (1992).

Accordingly, I find that the General Counsel has proved paragraphs 5(b), (c), (d), (e), and 12(b) of the amended consolidated complaint.

C. The Respondent's Unilateral Change to its Wage Policy

The Respondent is an admitted successor employer to Swanson Motors and as such was free to set the initial terms and conditions of employment on May 1 when it commenced operations of the dealership. *NLRB v. Burns Security Services,* 406 U.S. 272 (1972). The Union, however, must be provided with notice and an opportunity to bargain over changes made subsequent to its commencement of operations. *Ridgewell's, Inc.,* 334 NLRB 37 (2001), enfd. 38 Fed.Appx. 29 (D.C. Cir. 2002).

The General Counsel contends, and I agree, that the Respondent violated Section 8(a)(1) and (5) of the Act when, on July 23, 2006, it unilaterally changed its wage policy for unit employees (the service technicians) without giving the Union prior notice or an opportunity to bargain over the change. Although the Respondent denies the allegation in its answer, it nonetheless "affirmatively alleges that in July 2006, Eichorn Motors, Inc., changed its wage policy for technicians resulting in the technicians earning a higher rate." (GC Exh. 1(t) at 2, par. 12.) The General Counsel considers that statement an admission. I agree, at least as to one of the factual predicates to finding a violation.

David Brown, the Respondent's parts and services director admits that he changed the wage plan for the service technicians about August 1. (Tr. 85, 508.) He also testified that he did not inform the service technicians of the changes until early September. (Tr. 522.) Brown further admitted that he did not notify the Union before implementing the change. (Tr. 86–87.) There is some testimony by Cogger that he told the Union about the change in June or July. The Respondent does not argue that Cogger's conduct constitutes sufficient notice to the Union of the Respondent's changes to the wage policy. In that regard I note that there is no credible evidence that Cogger had any authority to act as the Union's agent for any purpose. This observation is supported by a review of the collective-bargaining agreement between the Union and Swanson. Nothing contained therein mentions in-house union officers. Moreover, the Respondent was well aware that International Union Representative George Klingfus was the designated union spokesperson. Brown testified that he "believes" that he told the service technicians of the changes in September, after they had be implemented. He states that he "told them that I believe a technician works hard and they should get paid for what they do and their knowledge." He offers no explanation why he waited for over a month to make this announcement. Additionally I credit his testimony only insofar as it is set forth above. I specifically do not find that he provided the service technicians with the details or the ramifications of the changes to their wage plan.

"Rates of pay," "wages," "income," and the methodology used to determine the numerical amounts thereof, are all mandatory subjects of bargaining. *Goya Foods of Florida,* 351 NLRB No. 13, slip op. at 3 (2007); *Beverly Manor San Francisco,* 322 NLRB 968, 971 fn. 11 (1997), enfd. 152 F.3d 928 (9th Cir. 1998). It is also immaterial that the income change is for

the better because the Act still requires bargaining about the mandatory subject of wages. *Goya Foods,* above, slip op. at 3. The General Counsel establishes a prima facie violation of Section 8(a)(5) by showing that the employer has made a material and substantial change in a term and condition of employment without negotiating with the union. E.g., *Taino Paper Co.,* 290 NLRB 975, 977 (1988). The burden then shifts to the employer to show that the unilateral change was privileged. E.g., *Cypress Lawn Cemetery Assn.,* 300 NLRB 609, 628 (1990).

It appears that the Respondent's primary, if not exclusive argument, is that its unilateral changes to its were not material and substantial. Thus, the Respondent contends that because each service technician continued to be paid at the same wage rate under the new wage policy "in practice, there was no change." (R. Br. at 47.) The Respondent concludes that the changes merely ignored the base and incentive rates. (As used in the record "incentive" and "bonus" rates are synonymous.) That statement appears to be in contradiction to Brown's testimony. Brown testified that in accordance with his changes the base rate was increased to the amount of the incentive rate. Thus, the previous base rate of $14.41 was increased to $23.61 for master service technicians (Ossefoort and Anderson), and $21.09 for Eckert and Cogger. This results in an increase of $9.20 and $6.68 respectively. Brown also testified that he eliminated all incentive rates that were part of the prior wage scale. Thus, the service technicians received one rate regardless of their production.

Of even greater significance to the service technicians was that under the wage plan as changed, paid only for "hours produced." "Hours produced" is a fixed amount of time allotted to perform a distinct repair on a vehicle. For example, to replace the front right axle seal on a Chevrolet pickup "pays" 2.8 hours. If the service technician completes that job in less time, he is still paid at for 2.8 hours. Thus, the more distinct repair jobs that can be done in less than the allotted time, the more money the service technician earns. On the other hand, if the service technician encounters difficulty in performing the repair, such as difficulty in removing a part, and consequently the 2.8 hour job takes 4 hours to complete, the service technician is still only paid for the 2.8 "hours produced." (Tr. 288–289.) Those hours are billed directly to the customer. The Respondent's counsel asked Brown if there were any theoretical situations under the changed plan where a service technician would earn less. Brown opined that it was not possible because even without any "hours produced" work available, there was training and shop maintenance that could be done. That work, Brown said, would also be paid at the "hours produced" rate, unlike the previous wage plan. Brown testified that under the new wage policy the service technicians "made more money." He calculated the increase as $200–$450 per pay period. (GC Exh. 88.)

Cogger credibly testified about a pay period when, contrary to Brown's theoretical testimony, Cogger earned substantially less as a result of the changes. The pay period was November 6 to 11. Cogger worked 34.25 hours but produced only 17.3 hours, and was only paid $21.09 for the 17.3 "hours produced," resulting in a gross pay of $364.86. (Tr. 292, 294–295, GC Exhs. 38–39.) Cogger testified that under the previous wage policy he would have also been paid the base rate of $14.41 for the 34.25 hours that he actually worked for a total gross pay of $493.54. When Cogger asked Brown about the discrepancy he replied that the service technicians were "being paid just for the hours we produced. No base pay anymore." (Tr. 296.)

Brown admits not "totally" understanding the previous wage policy. A brief example demonstrates the accuracy of his statement. The General Counsel asked Brown if, under the

previous wage policy, a service technician worked 40 hours but could only bill 30 hours to the customer, would the service technician be paid for the 40 hours. He answered that he did not think that the previous wage policy would pay the service technician for the 40 hours. He explained that the previous wage policy "doesn't say any guarantees. It just says we have to guarantee ´em that there's a job for 40 hours." His explanation is self contradictory. I also note that question does not include "guarantee." It does appear that Brown's thoughts regarding the previous wage policy are consistent with Cogger's undisputed testimony that he was not paid for the 34.25 hours that he actually worked, but only the 17.3 hours that were billed to the customer.

I find that the testimony of Cogger, Anderson, Ossefoort, and Walberg—men who worked under the previous wage policy and the man who created and administered it—to be far more reliable than Brown's and I credit their testimony over his. Walberg testified that he used the Swanson collective-bargaining agreement (GC Exh. 18) to "figure out" the pay for the service technicians. Walberg not only negotiated the Swanson contracts with the UAW but he "set up an incentive program . . . the harder they worked, the more they could get paid. We discussed before [referring to his earlier testimony about General Counsel Exhibit 18] the low and high bonus and the guarantee." (Tr. 471.) "Appendix A" of the contract "Classifications and Wage Rates," sets out the base pay and incentive pay rates for the service technicians. The base rate is $14.41. That is the rate that is paid when a service technician bills less than 38.5 hours per workweek. Workweek is defined in article 9, "Hours of Work." "A normal work week shall be a guaranteed forty (40) hours." (GC Exh. 18 at 6.)

Based on the foregoing, Ossefoort and Anderson testified that the service technicians under the previous wage plan would have been paid the base rate for a full "guaranteed" 40-hour workweek. Cogger confirmed the guaranteed rate, but applies it only to the hours actually worked. This slight difference is immaterial and would only result in Cogger earning even more under the previous wage plan. Nor is this difference surprising. Under the previous wage plan the men usually earned the high bonus rate—Ossefoort was only paid the base rate once during his employment with Swanson, and that was because he was ill. This minor disagreement does not detract from their credibility.

The Respondent argues that Walberg testified that he paid the Eichorn Motors' employees as set forth in Appendix A "Classifications and Wage Rates," in the Swanson contract. (GC Exh. 18 at 14.) The Respondent claims that the page "does not state that employees will be paid for hours worked. The page expressly limits pay rates to hours billed." I disagree. The pay rates are not limited to the billed hours, they are determined by the amount of billed hours, or as Walberg explained the "low and high bonus and the guarantee." The guarantee is the base rate. At the beginning of his testimony Walberg was handed the Swanson/UAW contract. He was directed to "Appendix 'A,' Classifications and Wage Rates," that is on page 14 of the Swanson/UAW contract. He agreed with the General Counsel's statement that page 14 represented how Swanson paid the service technicians immediately before the sale. He affirmed that after the purchase the Respondent continued to pay the service technicians "the same way as right here, by the contract." The contact is far more extensive than 1 page of a 2 page appendix. Walberg also "figured out their pay." This would require him to review other applicable provisions of the contract that might impact on the service technicians pay. For example article 12, section 1(a) sets forth a method unique to incentive mechanics to determine their holiday pay. (GC Exh. 18 at 8.) The guaranteed 40-hour workweek is located in article 10. Accordingly, I reject the Respondent's contention and find that the unilateral changes

made by the Respondent, were material and substantial, and had a significant impact on the employees' terms and conditions of employment.

Based on all the foregoing I find, as alleged in the complaint, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, without notifying and bargaining with the Union, changing the wage policy for its service technicians.

D. The Respondent's Unilateral Change to its Holiday Pay Policy

The General Counsel contends that under the Respondent's pay policy before November 28, for an employee to be paid for a holiday the employee had to work the day before and the day after the holiday, unless they had received an excused absence from the Respondent. After the changes unilaterally made on November 28, even if the Respondent granted the employee an excused absence for the day before or the day after a holiday, the employee would not be paid for the holiday.

George Klingfus, the Union's international representative, testified that the Respondent applied the Swanson holiday pay policy after it purchased the dealership. He further testified that under that policy for an employee to be paid for a holiday the employee had to work the day before and the day after the holiday, unless they had received an excused absence from the Respondent. Ossefoort, Cogger, and Anderson testified that their understanding was also that the Respondent continued the Swanson holiday pay policy after assuming ownership. Anderson additionally testified that he received permission to be absent the day before the Fourth of July and was paid for that holiday. At that point in time the Respondent had been operating the dealership for over 2 months.

The Respondent relies on the testimony of Walberg, Brown, and Coombe, and submits that the policy remained the same before and after November 28. Coombe's testimony does not specifically address the issue of an employee being given an excused absence on the day before or after a holiday He merely states that the employees would not get paid for a holiday if they missed work on the day before or the day after the holiday. He also testified that this was the policy in every dealership where he had worked. Walberg confirmed the general policy and agreed that it was the same as the Swanson policy, and claimed that he did not remember any exceptions. The General Counsel submits that the employees' testimony as well as the uncontested fact that Anderson and Ossefoort were paid for the Thanksgiving holiday, and Anderson for the Fourth of July holiday, is more persuasive evidence than Walberg's uncertain testimony. I agree, but I am also not convinced that Walberg, who was a credible witness, fully understood the question.

Immediately after Walberg stated that the employees had to use a vacation day or work on the day before or the day after the holiday, the General Counsel asked "if they had a pre-approved vacation day or sick day the day before or the day after the holiday? Walberg said "I don't—especially not a sick day, no, because it would be too easy for the technician to call in sick and be gone down the road somewhere. So sick—but I don't remember ever making an exception, I really don't." (Tr. 468.) To be consistent with his previous answer it would appear that an employee who had an approved vacation day would be eligible for holiday pay. This conclusion is supported by article 12—"Holidays"—set forth in the Swanson/UAW collective-bargaining agreement. Section 4 of that article deals with employees working the scheduled

workday before and after the holiday. (GC Exh. 18 at 8, sec. 4.) Presumably an employee who was granted an authorized absence is not scheduled to work. Walberg also appears to ignore the aspect of the pre-approved sick day, such as a medical or dental appointment, and addresses the situation of an employee simply calling in sick on a scheduled workday. Walberg would not approve that scenario, because it would be too easy for the employee to fabricate. I believe that Walberg may have misunderstood the question and directed his answer to situations where employees called in on the day before or the day after the holiday, without having previously obtained permission to be absent.

The foregoing conclusion is also consistent with Anderson's undisputed testimony that he was paid for the Fourth of July holiday although he was on an authorized absence the day before the holiday. The Respondent, in its position statement of January 10, 2007 (GC Exh. 3), submits that Walberg "mistakenly" paid Anderson. Walberg was not asked about Anderson being paid for the Fourth of July holiday. The Respondent, in its brief, states only that Anderson was paid because of a mistake by "Eichorn Motors." Anderson testified that he obtained authorization to be absent the day after Thanksgiving from service advisor Brian Kingsley, who Anderson testified was his direct supervisor. That practice may also explain Walberg's poor recollection concerning employees being absent on the days before and after a holiday.

As set out above the Respondent in its position statement submits: "A mistake was made with respect to Thanksgiving holiday pay and, it appears that a similar mistake was made by the prior service manager, Jim Walberg, with respect to one mechanic for the Fourth of July." (GC Exh. 3.) The Respondent continues to argue "mistake" in its brief, citing its position statement. I have found no direct evidence that paying Anderson for the holiday was a "mistake." To the contrary, the record supports Anderson's credible testimony that he was paid for the holiday in accordance with the Respondent's existing policy. Also, in contradiction to the Respondent's position statement, as explained below, the Respondent no longer contends that the holiday pay received by Ossefoort and Anderson was the consequence of a "mistake."

Accordingly, I find that the Respondent's holiday pay policy before November 28, 2006, was to pay employees for the holiday if they worked the day before and the day after the holiday, or were on authorized absence on one or both of those days.

1. The meeting on holiday pay

On the Monday or Tuesday following Thanksgiving, Coombe and Brown met with Cogger, Ossefoort, and Anderson, in Brown's office. Brown testified that the "purpose of the meeting was getting paid for Thanksgiving," because nobody had vacation time coming Ossefoort and Anderson would not have gotten paid for the day they were off or the holiday. The following narrative, regarding the meeting and events thereafter, is based primarily on the testimony of Cogger, Ossefoort, and Anderson. Coombe and Brown offered little by way of testimony. In its brief, the Respondent also relies on Brown's purported notes of the meeting. (GC Exh. 88(a).)

Cogger testified that Coombe opened the meeting by stating that "in order to get paid for the holiday you had to work the day before and the day after. (Tr. 278.) Anderson testified that at some point during the meeting Coombe claimed that according to the "Union" contract he (Anderson) and Ossefoort would not be paid for the holiday "because the contract read that if

you did not work the day before and the day after the holiday you would not get paid for the holiday."

Ossefoort testified that Coombe asked him and Anderson how they wanted to get paid for the Thanksgiving holiday. Coombe said "if you want to get paid the Union way you wouldn't get paid for it. If you wanted to get paid the Eichorn way they would pay you for it." (Tr. 134.) Ossefoort said that Coombe ended the meeting by telling them that they had until Thursday to tell him if they wanted to get paid the union way or the Eichorn way. Coombe testified that he thought that the men were asked how they wanted to be paid and they replied that it was up to him. He further testified that the three men were paid for the holiday. When asked why he paid Anderson and Ossefoort, after testifying that they were ineligible for the holiday pay, he responded: "[w]ell, there again, flexibility. I think every employer has earned the right to be flexible with his staff. If you want to do things to nurture people and build teams, you do it when you see fit." (Tr. 694.)

Brown's notes indicate that they "wanted to know what there [sic] thoughts were . . . so we would not be accused of unfair labor practices." Brown's notes and Cogger's testimony, indicate that Cogger said that he could not answer the question regarding the method of payment. Cogger also testified, without refutation, that Brown on another occasion asked him again how the service technicians wanted to get paid. Cogger said that he would not decide. In response Brown said that he had prepared holiday pay checks for all of them.

On November 28, the Respondent issued the following memo to all employees:

> TO BE ELIGIBLE FOR HOLIDAY PAY EVERY EMPLOYEE MUST WORK THE DAY BEFORE AND THE DAY AFTER A HOLIDAY TO RECEIVE PAYMENT FOR THE HOLIDAY

(GC Exh. 23.) Coombe characterized the memo, that he signed, as a "restatement."

2. Discussion

As set forth above, the record establishes and I find, that the holiday pay policy used by Swanson was also used by the Respondent. In accordance with that policy employees were paid for the holiday if they worked the day before and the day after the holiday, or were authorized to be absent on one or both of those days.

The record further establishes, and I find, that as of November 28, the Respondent unilaterally instituted a change to its holiday pay policy, whereby it would henceforth only pay employees for the holiday if they actually worked the days before and after the holiday. Moreover, even an absence that was excused by the Respondent would not satisfy this requirement.

It does not appear that there is any significant dispute regarding the statements made at the meeting by the participants. Although Cogger had minimal recall of the meeting, he also had the least interest in the topic because he had worked the requisite days. He did recall telling Brown that he was unable to answer Brown's question concerning whether the employees wanted to be paid the "union way or the Eichorn way."

Anderson's testimony was also creditable, although it appears that he may have been confused about the "choice" offered by Coombe. (Tr. 404.) It should also be noted that "Union way" and "Eichorn way," were used by Vice President Eichorn when he was speaking to Anderson. (See above at section B.) As a consequence of that conversation the Respondent was found to have committed unfair labor practices. (*Pan-Oston Co.,* 336 NLRB 305, 306 (2001) (Although not dispositive statements made by an alleged agent consistent with statements made by the employer support a finding of apparent authority.) Ossefoort was an impressive witness. His testimonial demeanor was open and forthright, his responses were thoughtful and detailed. He also recalled that Coombe told the employees that they would not be paid for the holiday if they chose to be paid the union way, but if they selected the Eichorn way they would be paid for the holiday. In general, I find that the testimony of Cogger, Ossefoort, and Anderson to be more complete, reliable, and trustworthy than that presented by Brown and Coombe.

Coombe's characterization of the November 28 memo as a "restatement" of the Respondent's policy is, at best inaccurate, and at worst a falsehood. The record is devoid of evidence that the Respondent ever communicated, in any form, a holiday pay policy. The characterization is at odds with the credited testimony of all the employee witnesses, as well as that of Klingfus, the UAW international union representative. It was Klingfus who negotiated and serviced the collective-bargaining agreements between Swanson and the Union. His testimony regarding the practice and procedure of the holiday pay policy, contained in the collective-bargaining agreement, was identical to that of the service technicians. Although he was not a disinterested witness he seemed to possess a creditable demeanor. I noticed no outward bias and the Respondent does not suggest otherwise. I find his testimony credible.

Of even greater significance is the contradiction between Coombe's characterization and the Respondent's position statements of December 21, 2006, and January 10, 2007. In those statements the Respondent refers to the "intended policy." It also admits that the employees were paid for the holiday "to assure the employees were not prejudiced by the employer's failure to provide notice of the policy to employees." (GC Exhs. 2–3.)

Based on the foregoing, I find that as of November 28, the Respondent unilaterally changed its holiday pay policy. Before that date, if the Respondent had excused an employee's absence on the day before and/or the day after a holiday, the absence did not disqualify the employee from being paid for the holiday. After November 28, employees were ineligible to receive holiday pay even with the Respondent's permission to be absence on either or both of those days. The change was made without notice to the Union and without giving the Union an opportunity to bargain over the change. Holiday pay is a mandatory subject of bargaining under the Act. *Paramount Poultry,* 294 NLRB 867 (1989). Accordingly, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act as alleged in the complaint.

3. The alleged direct dealing violation based on the meeting

The complaint also alleges that the Respondent violated Section 8(a)(1) and (5) by dealing directly with unit employees Ossefoort, Cogger, and Anderson regarding the Respondent's holiday pay policy. In order to prove unlawful direct dealing, the General Counsel must show: "(1) that the Respondent was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and

terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union." *Crittenton Hospital,* 343 NLRB 717, 738 (2004). I find that the necessary elements of unlawful direct dealing have been established.

Brown admitted that the purpose of the meeting on November 28, was to discuss holiday pay and there is no dispute that Coombe and Brown insisted that the employees select either the "Eichorn way" or the "Union way." Regarding the third element necessary for a finding of direct dealing the General Counsel submits that the meeting was held without the presence of the Union. Clearly that statement is accurate with regard to Klingfus, the UAW international union representative. There is no contention that Klingfus had knowledge of the meeting or the subject matter.

Brown's notes of the meeting, however, contain the following: "David Cogger stated he was the union steward and was sure he could speak for [Ossefoort and Anderson] that that decision [selecting a holiday pay policy] was up to us [Brown and Coombe]." (GC Exh. 88 (a).) Based on that entry the Respondent posits that Cogger was present as Ossefoort's and Anderson's union representative. The participants were not questioned concerning that notation. Why Cogger would claim that he could speak for Ossefoort and Anderson is puzzling because Ossefoort and Anderson were engaged in the same discussion.

A review of the collective-bargaining agreement between Swanson and the UAW discloses no mention of a steward or any in-house union officers. The only reference to union employee representatives relates to a union grievance committee and is of no relevance to this meeting. (GC Exh. 18 at 2.) ALJ Bogas found that Coombe violated the Act by dealing directly with Ossefoort and that Coombe's unlawful conduct occurred "out of the presence of Klingfus, the Union spokesperson." *Eichorn I,* JD slip op. at 17. Only approximately 2 months elapsed between Coombe's initial attempt to bypass the Union and this attempt. Accordingly, I conclude that the Respondent knew that Klingfus was the appropriate union spokesperson. To the extent, if any, that the Respondent is advancing a contention that Cogger was an adequate substitute, I reject that contention.

Accordingly, for the foregoing reasons, I conclude that the Respondent has violated Section 8(a)(1) and (5), when it bypassed the Union and dealt directly with the unit employees regarding their terms and conditions of employment.

4. The alleged 8(a)(1) violation based on the meeting

The General Counsel contends that Coombe threatened the employees that in order to be paid for the holiday they had to opt for the "Eichorn way," and that if they selected the "Union way" they would not be paid for the holiday, thereby violating Section 8(a)(1) of the Act.

> Under Section 8(a)(1), an employer may not interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. In determining whether an employer's statement violates Section 8(a)(1), the Board considers the totality of the relevant circumstances. In considering communications from an employer to employees, the Board applies the objective standard of whether the remark tends to interfere with the free

> exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect.

All Pro Vending, 350 NLRB No. 46, slip op. at 5 (2007) (internal quotations and citations omitted).

In addition to Coombe's statement Brown admitted telling the employees that under the "Union" contract Ossefoort and Anderson would not be paid, thus also giving a clear signal that selecting the "Eichorn way" was the only way they would be paid for the holiday. Brown explained this to the employees and insisted, to the point of giving them a deadline, that they make the choice. Brown told them it was because they had accused the Respondent of unfair labor practices, had been picketing the Respondent for the past week, and "so we would not be accused of more unfair labor practices."

These statements were made in a meeting where the Respondent sought to bypass the employees' exclusive collective-bargaining representative. The statements were made only a few months after Coombe threatened Anderson and Ossefoort with discharge. *Eichorn I,* JD slip op. at 9–10. The Respondent argues that the holiday pay discussion could not reasonably be understood to be a threat. That the discussion was an attempt to obtain clarification so as to avoid further unfair labor practice charges. The Respondent submits that any reference to the "Eichorn way" or the "Union way" was merely a shorthand means to refer to Eichorn Motors' existing policy and the predecessor Swanson Motors' contract terms.

I reject the Respondent's contentions. The employees certainly had no need for "clarification." Brown testified that Ossefoort and Anderson "assumed that with an excused absence that they would get paid." Of course they would. They had fully complied with the Respondent's existing policy. Anderson was paid for the Fourth of July holiday without question or comment. The Respondent submits that the confusion resulted from "their obtaining permission for the time off but not having accrued vacation to take time off." (R. Br. at 35.) Certainly Anderson and Ossefoort knew they had no accrued vacation, and there is no evidence that the lack of vacation time was ever mentioned to either employee.

I also note that only a few weeks after this meeting Vice President Eichorn also told Anderson to choose between the "Eichorn way" and the "Union way" and that Anderson's bannering demonstrated that he had chosen the Union way. Vice President Eichorn then threatened Anderson by telling him that if he decided to go the Union way he would not be working for Eichorn Motors. Vice President Eichorn's use of those expressions had nothing to do with existing policies or the terms of Swanson's collective-bargaining agreement.

Based on the foregoing I find that the Respondent violated Section 8(a)(1) of the Act when it threatened its employees that they would not receive holiday pay if they choose to be paid the "Union way."

E. The Respondent's Unilateral Implementation of the Customer Satisfaction Index

General Motors has a national program called the Customer Satisfaction Index (CSI) and Service Satisfaction Index (SSI) under which it sends surveys to customers in an effort to measure customer satisfaction with its dealerships on a national basis. The CSI measures

customer satisfaction on the sales side of the dealership and the SSI measures customer satisfaction on the service side of the dealership. In this decision the terms are used interchangeably and refer to both survey results.

A "service satisfaction survey" is only sent to customers that have vehicles that were serviced under a GM warranty. Completion of the survey is optional and not all customers return the surveys. GM complies the results and sends them to the dealerships at the end of each month. The results are given for 3-and 12-month periods. There is usually a 60-day lag time because of the time it takes GM to formulate the information. Thus, the December 2006 report would usually represent August, September, and October. To the extent that Coombe's testimony at the hearing regarding the lag time deviated from that which was read into the record from his affidavit, I credit his affidavit. (Tr. 47.)

The service satisfaction survey results can be used as a measure of the service technicians' performance. GM assembles the relevant elements of the service satisfaction survey into a "service technician performance summary." This summary uses four of the 18 questions in the survey. The questions are: (1) question 12: "Were all your service concerns corrected;" (2) question 13: "How satisfied were you that your vehicle was fixed right in this service visit;" (3) question 16: "INDEX" overall service visit; and (4) also question 16: "% TOP BOX overall dealership service visit." The results for question 12 are given as the percentage of customers that answered "all of their service concerns were corrected." The index results for questions 13 and 16 are based on a scale of zero to four. A zero equals "very satisfied," and a four equals "completely satisfied." Question 16 "top box percent" is the percentage of customers that were completely satisfied.

GM also sends dealerships documents showing the relationship between their CSI scores to other dealerships within their zone. The Respondent's zone includes 51 dealerships in Minnesota, North Dakota, Wisconsin, and Northern Iowa. Coombe testified that the zone average is a benchmark for multiple programs used by GM. (Tr. 660–661.)

Brown admitted using the CSI results to evaluate the service technicians and that he considered "fixed right the first time," as the preeminent question. Brown offered no rationale for his conclusion. Coombe opined that "fix it right" is the score, in his mind, that GM "holds us accountable for. That's the benchmark, if you will." (Tr. 662.) Coombe then launched into a generalized explanation regarding the importance of the Respondent's rank among the other dealerships in its zone. The Respondent never offered no evidence in support of Coombe's testimony that GM "holds them" accountable solely for its "fix it right" score." Nor did Coombe explain or acknowledge the relationship between the two "benchmarks" about which he spoke—the zone average and the "fixed right the first time" score. The record supports a finding that the "fixed right the first time" score is one of several, equally weighted factors, used to calculate the zone average.

In support of the foregoing finding the General Counsel points to the GM "Mark of Excellence" program. This is a specific program based, in part, on one of the elements of the service technician performance summary. General Counsel Exhibit 17 is a letter dated October 12, 2006, to all GM service managers from GM headquarters. The letter was included as part of a "Mark of Excellence" packet received by Ossefoort for achieving the platinum level "Mark of Excellence" award. Under "Service Challenge Banquets/Best of the Best" the letter instructs that

service managers should continue to focus on "achieving a dealership SSS [service satisfaction survey] score of at least 3.00 on your question # 16 twelve-month index score reported in December 2006." The section continues to explain other requirements and the awards for achievement. Other than Brown and Coombe's opinions, the record contains no evidence that GM—the entity that developed the survey—shares their view about the increased significance of the "fixed right the first time" score.

Ossefoort, Cogger, and Anderson credibly testified that before November 29 they were not told of a policy under which they could be discharged for low CSI scores. Indeed, the three credibly testified that the Respondent never addressed CSI scores in any manner before November 29.

On November 29, the following memo was distributed (GC Exh. 7.):

NOVEMBER 29, 2006
IMPORTANT POLICY PROVISION
TO ALL EMPLOYEES:
EFFECTIVE TODAY, ANY EMPLOYEE NOT REACHING ZONE AVERAGE CSI SCORES PER GENERAL MOTORS GUIDELINES CAN AND MAY BE DISMISSED BY MANAGEMENT.
MICHAEL COOMBE
GENERAL MANAGER

Coombe admitted that he created and distributed the memo to employees shortly after receiving the November CSI scores and determining that the November service satisfaction survey scores were unsatisfactory.

Also on November 29, the Respondent held a lunchtime meeting with the service department in the lunchroom. The memo was distributed at this meeting. Brown testified that Coombe stated "it was totally unacceptable and if our CSI scores didn't increase that you could be terminated." Brown said that Coombe told the employees that they had 30 days to improve their scores. Coombe concedes that he may have made that statement. Brown testified that he tried to explain to the service technicians how the CSI scores were computed. Cogger testified that Brown handed him and other employees graphs. Brown told Cogger that Cogger was the only employee above the zone average. (GC Exh. 37.)

The Respondent does not dispute the testimony of Klingfus that he was never informed of the Respondent's intention to use CSI scores as a measure of employee performance or that employees could be disciplined or discharged for failing to meet a specific CSI score. Despite denying this complaint allegation the Respondent merely offers that the November 29 memorandum "was a codification of what all the technicians already knew, i.e., that they could be disciplined, up to termination, based on poor performance." There is no question that the employees knew that they could be disciplined for poor performance. The record is also clear, however, that the employees knew very little, if anything, about CSI scores. Nor were they ever informed that those scores could be used as a reason for discharge. At least not until Coombe's November 29 memo.

Accordingly, based on the foregoing I find as alleged in the complaint that the Respondent violated Section 8(a)(1) and (5) by unilaterally implementing a CSI policy under which unit employees could be discharged for failing to attain certain scores. That policy was implemented on November 29 without notifying the Union and without affording the Union an opportunity to bargain over a mandatory subject of bargaining. *Fresno Bee,* 339 NLRB 1214, 1214 (2003).

F. The Respondent's Unilateral Change to its Training Pay Policy

It is undisputed that GM requires service technicians to take training classes. The classes can be taken online and in-house via interactive satellite training. Brown explained to the service technicians the importance of completing at least the minimal GM training requirements because of dealership payment and benefit issues. To accomplish this goal Brown admitted telling the service technicians that they would be paid double time training. That rate was paid from September 5 until November 30. Brown stopped paying the double time rate at that time because the service technicians had attained a hundred percent of the GM training requirements. Brown admitted that he did not notify the Union before he began paying the increased rate or before he stopped paying the increased rate for training.

Based on the foregoing the General Counsel contends that a prima facie case has been established with respect to the Respondent's unilateral cessation of paying service technicians double time for training.

The Respondent contends that the double time rate was temporary, that it was instituted without objection, and that it was required for the Respondent to receive certain model cars from GM and warranty work payments.

The General Counsel counters that the fact that program is temporary does not privilege an employer to implement or eliminate it without first bargaining with the Union. *Abrahanson Chrysler-Plymouth, Inc.,* 234 NLRB 955, 969–971 (1978). I agree and I also find that the business reasons proffered by the Respondent for increasing the rate, even if true, fail to establish an economic exigency sufficient to excuse it from bargaining. E.g., *Goya Foods of Florida,* 347 NLRB No. 103, slip op. at 3 (2006).

Based on the foregoing I find that the Respondent violated Section 8(a)(1) and (5) of the Act by its failure to notify and bargain with the Union concerning the elimination of paying its service technicians double time for training. *Fresno Bee,* above.

G. The 8(a)(3) and (4) Allegations

The General Counsel contends that the discharge of employees Ossefoort, Cogger, and Anderson was because of their union and concerted activities as well as their giving testimony in *Eichorn I,* and was therefore unlawful under Section 8(a)(1), (3), and (4) of the Act. The Respondent argues that the discharges were lawfully motivated by the employees' work records and conduct. I find merit in the General Counsel's contentions.

The analytical framework for determining when a discharge violates the Act was set out in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S.

989 (1982). Under *Wright Line,* the General Counsel must prove, by a preponderance of the evidence, that protected activity was a motivating factor in the Respondent's decision to discharge the employees. Thus, the General Counsel must show that the employees engaged in protected activity and that the Respondent knew of the activity. The General Counsel also must establish that the activity was a substantial or motivating reason for the employer's action. Unlawful motivation may be based on direct evidence of employer animus towards protected activity. *Robert Orr/Sysco Food Services,* 343 NLRB 1183, 1184 (2004). Proof of discriminatory motivation can also be inferred from circumstantial evidence based on the record as a whole. Id. citing *Embassy Vacation Resorts,* 340 NLRB 846, 848 (2003). Thus, the pretextual nature of the discharge may support an inference of discriminatory motivation. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1966); *Active Transportation,* 296 NLRB 431, 432 (1989), enfd. mem. 924 F.2d 1057 (6th Cir. 1991); and *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). If the General Counsel meets this burden, the employer then bears the burden of showing that the discharge would have occurred even in the absence of the protected conduct. *Wright Line,* supra at 1089. See also *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996).

Similarly, to establish an 8(a)(4) violation the General Counsel must prove, by a preponderance of the evidence, that the Respondent's decision to take disciplinary action against the employees was motivated by the employees' filing of charges or testifying. *Wayne W. Sell Corp.,* 281 NLRB 529, 534 (1986). Because 8(a)(4) violations turn on motivation they also are analyzed using the *Wright Line* methodology. *McKesson Drug Co.,* 337 NLRB 935, 936 (2002).

The Respondent admits, as it must, that it knew that Ossefoort, Cogger, and Anderson were open and active union supporters. (R. Br. at 5.) Aside from Eckert's half hour of bannering, Ossefoort, Cogger, and Anderson were the only employees that engaged in bannering. Concerning its knowledge of Ossefoort's, Cogger's, and Anderson's participation in the Board's processes the Respondent concedes that it had knowledge of "certain employees testifying at the November trial." Ossefoort, Cogger, and Anderson each testified on behalf of the General Counsel at the hearing in *Eichorn I*, on November 14. They each testified, without contradiction, about their prior testimony in this hearing. It is also undisputed that Brown and Coombe attended and testified at the prior hearing. It is also undisputed that Donald Conrad, an employee in the Respondent's sales department also testified on behalf of the General Counsel in *Eichorn I*. Accordingly, I find that the Respondent knew that Ossefoort, Cogger, Anderson, and Conrad gave testimony under the Act. I also note that those four employees were named discriminatees in a Board charge filed on December 28, 2006, which will be addressed below. *Fairprene Industrial Products,* 292 NLRB 797, 803–804 (1989), enfd. mem. 880 F.2d 1318 (2d Cir. 1989). The requisite animus is provided by findings of the 8(a)(1) and (5) violations, set forth above, as well the similar 8(a)(1) and (5) violations found by Judge Bogas in *Eichorn I*. Accordingly, I find that the General Counsel has met the initial burden set forth in *Wright Line.* E.g., *Wal-Mart Stores,* 340 NLRB 220, 221 (2003). I also find that as of November 14, the date the employees testified at the Board hearing in *Eichorn I*, the General Counsel met the initial burden regarding the 8(a)(4) allegations. *Leading Edge Aviation Services,* 345 NLRB 977, 988 (2005), enfd. 212 Fed.Appx. 193 (4th Cir. 2007).

Set forth below is the evidence presented by the General Counsel relating to the Respondent's discipline and discharge of the individual employees. In the interest of brevity and

ease of review I have concluded each individual section with the General Counsel's response to evidence presented by the Respondent for the first time at the hearing.

1. James Ossefoort

Ossefoort is a master technician and he worked in that capacity for Swanson's for 8-½ years. Ossefoort is capable of making all vehicle repairs, but specializes in electrical and drivability issues. His duties remained the same after Eichorn bought the dealership. Ossefoort was discharged on January 3, 2007.

GM has recognized Ossefoort for his expertise in diagnosing and repairing electrical components. Ossefoort earned the highest "Mark of Excellence" award achievable at GM. In order to attain that level Ossefoort had to achieve certain test scores, receive an ASE certification in eight categories, complete a 100 percent training in electrical components, and maintain good CSI scores. Ossefoort's award reads: "It takes a solid blend of skill, experience and commitment to deliver the best. That's what you've done." In addition to an award certificate Ossefoort received a $375 gift. Ossefoort was also awarded five or six Mark of Excellence awards during his employment with Swanson.

Ironically, as admittedly important as training and CSI scores are to the Respondent, Coombe refused to attach any significance to the award. Coombe testified that the Mark of Excellence award "doesn't form an opinion for me." Coombe offered no explanation why he held the award in such low esteem. His viewpoint also appears to be contrary to GM's corporate-wide awards policy. I find his testimony especially troubling, viewed in conjunction with his threat to discharge Ossefoort, and the other service technicians, as found by Judge Bogas. The only apparent explanation in the record for Coombe's reluctance to give Ossefoort credit for his achievements is his animosity towards Ossefoort because of his continued support for the Union and his giving testimony at the Board's hearing in *Eichorn I.*

a. The August 21 employee warning report

Brown signed an "Employee Warning Report," on August 21 stating that Ossefoort "did not follow SI [service information] bulletin to repair trouble—costing customer a fuel pump and Eichorn a dissatisfied customer." The violation is designated "substandard work quality" and the "action to be taken" is a "warning." (GC Exh. 25.) Ossefoort did not sign the report nor was he aware of its existence until he reviewed the documents contained in his unemployment packet that he received from the State employment office in mid-January 2007.

Ossefoort testified that he remembered the vehicle and that it was in the shop on May 9, July 10, and August 21. The initial complaint was that the check engine light came on and the vehicle lacked power. Ossefoort scanned the vehicle with an electronic device that indicated that the problem was a large leak in the fuel system. Ossefoort reviewed the appropriate SI bulletin regarding a large leak in the fuel system. SI bulletins are cases with the same problem that are compiled by GM to help service technicians to quickly find solutions. Ossefoort test drove the vehicle without incident. He determined that the problem was intermittent, and that the vehicle was not then malfunctioning. He replaced the fuel filter because it was under recall.

The vehicle was not brought in again until July 10. This time the complaint was an intermittent lack of power. The scan indicated the need for a high pressure fuel test. The SI confirmed that this test was the next step to determine if the problem was the fuel pump or the fuel injectors. Ossefoort testified that the test indicated a defective fuel pump. The procedure directed that the fuel pump be replaced, but it did not direct that the fuel injectors be tested at that time. Ossefoort replaced the pump, test drove the vehicle, and believed that the problem was solved. The vehicle, hauling a trailer, returned on August 21. This time the complaint was that it "loses power under load." Ossefoort again performed the high pressure test. The results indicated that the fuel injectors were defective and he replaced them.

Brown states, without predicate, that Ossefoort told him that the vehicle "still had no power." Brown claims that he read the SI which stated that "it needed injectors." Brown asked Ossefoort "Why didn't you replace the injectors? Brown claims that Ossefoort replied "Because I didn't think that was the problem." Brown claims that at some later point on August 21, he partially completed the employee warning report.

I credit Ossefoort's testimony regarding this incident. As I have previously found, Ossefoort had an impressive testimonial demeanor. I find his testimony more plausible than Brown's and it is consistent with Walberg's testimony regarding the repair of vehicles in general, and the specific reasons for not correcting the problem on the first visit. I find Brown's testimony is abrupt, inconsistent, and surreal.

Ossefoort credibly testified that Brown never spoke with him about this vehicle. Brown had no first hand knowledge regarding the initial repairs because he (Brown) was not then employed by the Respondent. Brown's version of what happened, even if accepted, does not significantly contradict Ossefoort's testimony. Brown's claim is simply that he read an SI that directed that the injectors be replaced first. From this Brown, apparently using 20/20 hindsight, concludes that had Ossefoort replaced the injectors initially the vehicle would have been fixed and the customer would not have had to pay $1640.79 to have the fuel pump replaced. It is true that after the fuel pump and the injectors were replaced the problem was resolved. It does not follow, as Brown concludes, that had the injectors been replaced first, the pump would not have had to be replaced later. Brown does not address the test administered by Ossefoort that indicated that the fuel pump was defective. He also does not address the successful road test that Ossefoort took, after the pump was installed, that indicated that the problem was resolved. There is also no evidence showing that the SI that Brown allegedly read on August 21, was the same as those that Ossefoort reviewed earlier.

Brown offers no predicate as to how his discussion with Ossefoort came about. All three of the service technicians demonstrated that they had a great deal of pride, as well as outsized egos, when testifying about their knowledge and abilities to repair vehicles. Ossefoort perhaps even more so than the other two. It appears that Ossefoort's ego is justified. In addition to his numerous Mark of Excellence awards, Brown also testified that Ossefoort was the most knowledgeable of the service technicians. I cannot believe that Ossefoort, under any circumstances, would ask Brown for help in diagnosing a problem.

I observe that the final work order has the following notation in the upper left corner "Get story from 202." (GC Exh. 83(a).) Ossefoort's employee number is 202. I am reluctant to draw

any conclusion from the notation because it has not been addressed by the parties. The notation, without more, does not establish that Brown or anyone spoke to Ossefoort.

Nothing contained in the employee warning report indicates that Brown "got the story" from Ossefoort. The report is incomplete and internally inconsistent. It is clearly meant to be shown to the employee. There are two boxes on the bottom of the form. One indicates that the employee has read and understands the report, and the other, that the employee declined to sign the report. The boxes are blank. There is a box indicating agreement with the supervisor's statement, and a box indicating disagreement, with space for a reply. Neither box is marked. Under "Previous Warnings" 8-21-06 is written, the alleged date Brown prepared the report, and a check mark under "Oral" with Brown's signature as supervisor. Under "Action to be Taken" the warning box is checked. The section "Timetable for Improvement" is blank. The options are "immediate, 30," and "60" days, and "other" with space for an explanation. The "Consequences" section is apparently intended to put the employee on notice regarding the consequences if improvement is not forthcoming. In this report the warning and suspension boxes are blank and "dismissal" is checked. There is no contention that this was Ossefoort's second warning on August 21. There is no evidence that Ossefoort was warned by Brown on August 21. Brown did not testify that Ossefoort was in any manner reprimanded for the repair of this vehicle. According to Brown he asked Ossefoort why he did not replace the injectors and Ossefoort replied that he did not think they were the problem. According to Brown that was the end of the discussion. Brown did not testify about the employee warning report and he does not claim that he warned Ossefoort that a recurrence of this conduct would result in Ossefoort's dismissal.

The most surreal aspect of this alleged incident is that the Respondent is arguing that Ossefoort's failure to research the SI's cost the customer $1640.79 for an unnecessary fuel pump, and yet even when considering Brown statements, there is absolutely no evidence that Ossefoort received any form of reprimand.

Perhaps in response to the foregoing concern, the Respondent had Brown explain how he uses the employee warning reports. The form is the same as that used by Swanson. What is unique and confusing is how Brown allegedly uses the form. By way of explanation Brown discussed two employee warning reports. The first is the report he wrote concerning the "ASV" vehicle, that has been discussed above. Brown testified that those employee warning reports are "just for housekeeping for myself. It's just something that I've observed during the day or—from a repair—or some statements that were made between the tech and I, and I just want to document that these were the circumstances, and I put that just so I can read it later on and refresh my memory." (Tr. 528.)

The Respondent offers a written warning issued to Ossefoort on December 19 as an example of the other purpose for which he uses employee warning reports. (GC Exh. 31.) Brown explains:

> To document that they did something wrong and there was a upset customer. I mean, the difference between these two is that I have a conversation with a tech on how he repaired a vehicle and the customer is not involved, I may not have him sign it—I just document it. But when there's a customer involved, I'll try to make out a form and—

> and—especially when the customer involves the general manager, the service advisor, and myself, then I'll make out a form and have him sign it. [Tr. 529.]

Based on Brown's description it would appear that the alleged incident where Ossefoort caused the customer to pay $1640.79 for an unnecessary part, and caused the Respondent a "dissatisfied customer," would fall within the "have him sign it" category.

In any case the General Counsel established beyond any doubt that Brown's alleged system for when and under what circumstances he has employees sign reports, and when he uses the reports to refresh his recollection, is certainly honored more in the breech in his dealings with Ossefoort, Cogger, and Anderson. (Tr. 623–631.) The Respondent implicitly acknowledges this point by its argument that the Respondent has no policy requiring Brown to document all instances where the service technicians are not working up to his expectations. That statement begs the question of why he varied his professed practice. I am mindful that an administrative law judge cannot substitute his judgment with regard to the discipline imposed for that of the employer. *All Pro Vending,* 350 NLRB No. 46, slip op. at 7 (2007). Nevertheless, it is the role of the administrative law judge, in the first instance, to evaluate whether the reasons proffered for the discipline were the actual reasons or mere pretexts. See generally *Detroit Paneling Systems,* 330 NLRB 1170, 1171 fn. 6 (2000) (and cases cited), enfd. *Carolina Holdings, Inc. v. NLRB,* 5 Fed.Appx. 236 (4th Cir. 2001).

The Respondent offers no explanation as to how or why all of Ossefoort's admittedly unsigned and unseen employee warning reports got to be included in the material it provided to the State employment office. Based on Brown's alleged practice, they were prepared to refresh his recollection. It is also evident that they were sent to the State employment office in an attempt to convince that agency of the validity of Ossefoort's discharge. I find that the Respondent's alleged reason for preparing this employee warning report is patently pretextual. I additionally find that its total failure to provide any explanation of how and why this report was sent to the State employment office, reinforces a finding of pretext. As will be seen the same can be said for the other unsigned and unseen reports given to Ossefoort and Cogger. When an employer's stated motive for an action is found to be false, the circumstances may warrant an inference that the true reason is an unlawful one which the employer seeks to conceal. E.g., *A–1 Portable Toilet Services,* 321 NLRB 800, 806 (1996). Having found that the Respondent has failed to provide a credible explanation for preparing the employee warning report and for submitting it to the State employment office, I find that the true reason for the Respondent's actions was Ossefoort's union and protected concerted activities. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) as alleged in the complaint.

b. The November 15 employee warning report

Service technicians work from 8 a.m. to 4:30 p.m. with a half-hour lunchbreak. The service technicians use a weekly timecard to record when they arrive, depart, and take lunch. A daily timecard is used to record the time it takes to complete a repair. The hours recorded on the daily timecard determine their pay. Brown testified that the weekly timecard is more important than the daily. He explained that if an employee is injured elsewhere and arrives at work at 11:43 a.m., but writes 8 a.m. on his timecard in order to falsely claim a work-related injury, the Respondent would not know that the employee had arrived late because of the altered timecard.

(Tr. 578–579.) Notwithstanding Brown's testimony, there is no evidence that the Respondent has a policy requiring service technicians to get approval before they write the time on their timecards, or requiring them to have any changes made to their timecards initialed by a supervisor.

Ossefoort testified that before November 15, if he forgot to punch in, he would write the time on his timecard. If Kingsley, the service advisor, was readily available he would ask him to initial it. Ossefoort testified that Swanson used the same system, and that he only had the card signed if he could find Kingsley "right then and he was handy." (Tr. 189.) Cogger and Anderson corroborated Ossefoort's testimony. Anderson testified that at some point he heard that the timecards should be initialed, but he could not remember who said it, or by whom he was employed when it was said. Anderson also testified that while employed by the Respondent he wrote the time on his timecards and only sometimes sought supervisory approval. Anderson was never disciplined for his conduct.

Ossefoort testified that on November 14 he came directly from the *Eichorn I* hearing to work, arriving at 1 p.m. He was immediately given an assignment by Kingsley and he went right to work. Later it occurred to him that he had not punched in before he began working on the vehicle. He wrote in the time on his daily timecard, but did not get it initialed.

The following day Brown gave Ossefoort an employee warning report for writing his time on his timecard. (GC Exh. 29.) Ossefoort testified that he and Brown were alone near the timeclock when Brown handed him the warning. Ossefoort testified that Brown said "If you are going to make us play by the rules we are going to make you play by the rules too." Brown denies making that statement. Ossefoort testified that he made a remark about Brown throwing his weight around and the conversation ended.

The General Counsel submits that there is substantial evidence demonstrating that before and after November 15, other employees wrote the time on their daily timecards without having the time initialed, and were not disciplined. Cogger testified that on at least 11 occasions between June 6 to November 30, he wrote the time on his daily timecard, did not have it initialed, and was not disciplined. (GC Exh. 51, Tr. 330–337.) The Respondent raised no objection to this evidence, and it is not addressed in its brief. The General Counsel also offered the undated daily timecards of Cogger, Ossefoort, Anderson, and employees Ricky Kinkel and Wade Eckert (GC Exh. 141) and the dated timecards covering the period from September 17, 2006, to January 5, 2007, for the same employees. (GC Exh. 142.) The Respondent did not object to the admission of this evidence. The General Counsel represents, without opposition, that these exhibits show that on at least 63 occasions one of the foregoing named employees wrote the time on his daily timecard without having it initialed. The General Counsel also observes that the Respondent has offered no evidence that it disciplined any employees on any of those 63 occasions.

The Respondent cites to Ossefoort's testimony on cross-examination to justify its conduct. Thus, the Respondent argues that Ossefoort knows the importance of accurately tracking the employees' time. The Respondent submits that Ossefoort also knew that it was his responsibility to punch in and out under that policy. Although the question asked by the Respondent's counsel includes "policy," Ossefoort made it clear that he was unaware that the Respondent had a policy requiring that a supervisor initial the writing. Ossefoort's testimony on

direct and cross-examination was consistent in all aspects. The evidence submitted by the General Counsel overwhelming supports Ossefoort's testimony, as well as that of Cogger and Anderson on this issue.

The Respondent also contends that Ossefoort's explanation that he only sought approval from a supervisor when one was available is incredible. I disagree and find his statement is consistent with the testimony of the other witnesses, including Brown. Brown testified that the daily timecard "wasn't much of a concern" because it's purpose was just to prove to the customer that the service technician had actually worked on the vehicle. The evidence shows that the preferred method is to have a supervisor initial the time, if one is readily available. It is self-evident that if the service technician forgets to punch in before he starts working on a vehicle, and then has to find a supervisor, the repair will take longer to complete. This appears to have been the situation on November 14. As soon as Ossefoort arrived Kingsly gave him an assignment. Kingsly, who makes the assignments, had to have known that Ossefoort had just arrived, thereby removing Brown's alleged insurance concern.

I also find that Brown knew that Ossefoort was attending the *Eichorn I* hearing on November 14. Although Brown answered "No" in response to Respondent's counsel's question "Did you make a comment on November 15 to Mr. Ossefoort along the lines of 'if you make us play by the rules, we'll make you play by the rules.'" I do not credit his denial. Brown lacks the testimonial demeanor of a witness who is forthcoming and honestly concerned with giving an accurate account of events. In response to why he issued the warning he states "For the writing in his time on his daily time ticket." In response to "Can you explain why it was that—well, what he did wrong? He answered, "He wrote in the time that he was working on a vehicle rather than using the timeclock." In response to "Is that something that is not proper?" He responds, "Yes. It's not proper." He never confirms or denies the location where he gave Ossefoort the reprimand, whether they were alone, and what was said and by whom. His only comment regarding the actual issuance of the discipline is to deny Ossefoort's accusation, he provides no alternative version.

I credit Ossefoort and find that the timing of the Respondent's action, locating Ossefoort's timecard during the afternoon, following his morning testimony in *Eichorn I,* and reprimanding Ossefoort the very next day, suggests an unlawful motive. The overwhelming evidence of disparate treatment also strongly supports a finding of unlawful motive. Brown's comment to Ossefoort, made as he gave Ossefoort the reprimand, is direct evidence that the reprimand was issued in response to Ossefoort testifying at the hearing and his union support. The Respondent has not demonstrated that it would have issued the discipline in the absence of Ossefoort's union activity and giving testimony in *Eichorn I.* I conclude that the reason offered by the Respondent for issuing this discipline is a pretext, and as such is evidence that the Respondent was trying to hide the real reason for reprimanding Ossefoort, which is his union activity and his testifying at the Board's hearing. Accordingly, I find that the Respondent has violated Section 8(a)(1), (3), and (4) as alleged in the complaint.

c. The December 19 report

Ossefoort forgot to replace the hubcaps on a vehicle he had repaired on December 19. Brown testified that although the incident was minor the customer was inconvenienced, and he issued Ossefoort a written warning. Brown signed the warning.

The General Counsel argues that this discipline was issued 1 month after Ossefoort testified in *Eichorn I,* and approximately 2 weeks after the Charge in case 18–CA–18226 was filed. Ossefoort was also bannering during the time of the incident. The General Counsel submits that the timing evidence and the minor nature of the incident combined with the general evidence of union animus establishes that the Respondent would not have disciplined Ossefoort in the absence of his union activity and his giving testimony in *Eichorn I.*

Assuming that the General Counsel has met her initial burden under *Wright Line,* I find that the Respondent has demonstrated that it would have disciplined Ossefoort even in the absence of his protected activity and giving testimony in *Eichorn I.* I have evaluated this discipline, keeping in mind the totality of the circumstances, especially the Respondent's numerous unfair labor practices. Notwithstanding the foregoing, I find that regarding this incident the Respondent had a legitimate motive for disciplining Ossefoort.

Timing alone may provide an inference of discriminatory motive, but does not require such a finding. Here, unlike *NLRB v. Rain-Ware, Inc.,* 732 F.2d 1349, 1354 (7th Cir. 1984), relied on by the General Counsel, it is not the Respondent that initiated the action but Ossefoort's carelessness. Thus, I am unwilling to find that the timing in this instance is evidence of unlawful motive. Although the conduct is minor, the discipline is commensurate, and certainly not so egregiously inappropriate as to sustain a finding of discriminatory motivation. I find that the Respondent has met its burden under *Wright Line* by demonstrating that it would have disciplined Ossefoort even in the absence of his union activity and his giving testimony in *Eichorn I*. Accordingly, I find that the Respondent has not violated the Act.

d. The December 28 employee warning report

The December 28 employee warning report is another example of discipline that was written without even talking to the employee or giving him a copy of the discipline. Ossefoort only became aware of the report because Coombe alluded to it during Ossefoort's discharge meeting. A copy of the discipline was also included in the packet Ossefoort received from the State employment office. The report is dated December 28, and is based on an incident that allegedly occurred on July 5. (GC Exh. 33.) The violation is for "substandard quality of work." The supervisor's statement allegedly supporting that conclusion was written by Brown and provides: "Jim installed the laser panel . . . customer came in 12/20/06 dissatisfied that the trim was installed improperly. It is now kinked. Ordered a new kit to replace the one on the truck. Employee warning reports dated "8/21/06, 11/14/06, and 12/19/06" are listed under "Previous Warnings." "Dismissal" is the "action to be taken."

A laser panel is a chrome decoration located on the bottom of a vehicle, along the sides. They are attached using two-sided tape. Ossefoort credibly denied installing the panel. Walberg was still the parts and service director when the panel was installed. He credibly testified that he saw Kingsley, the service advisor, installing the laser panel.

Ossefoort testified that he "typically writes his story" on the back of the repair order. The back of the repair order for this job is blank. (GC Exh. 80.) Ossefoort additionally explained that his employee number is on the invoice because a service technicians' number must appear on an invoice before it can be closed out.

Brown admitted never speaking to Ossefoort about this incident. He wrote the employee warning report for his own purpose. He said that he thought that Ossefoort installed the panel because Ossefoort's timecard was on the back of the repair order. Brown stated that he completed the warning report after the customer complained. Brown stated that it was his intention to discuss the matter with Ossefoort when the vehicle returned to the dealership to have the panel replaced.

Brown's testimony is not worthy of belief. Brown testified that he "filled this out" after the customer complained on December 20. He never explains why he felt it necessary to completely fill out the report, including the previous warnings section, and the dismissal box. He never explains why he changed the date on the top of the form and dated the bottom December 28. The Respondent mistakenly reads the bottom date as December 23. (R. Br. at 14.) Brown never explains why, on December 20, he believed that Ossefoort was entitled to "defend himself," but at Ossefoort's discharge meeting on January 3, 2007, he did not speak up when Coombe referred to the employee warning report as part of the "bunch of stuff" the Respondent had on Ossefoort. Brown never explained how a form that he used "[j]ust for recordkeeping for myself" ended up in a folder on Coombe's desk. Other than a recitation of the facts (R. Br. at 14), I have found no explanations or comments on this issue in the Respondent's brief.

As set forth above, the Respondent was served with the charge in Case 18–CA–18256 on December 28. Ossefoort is identified by name in that charge, as are Cogger and Anderson. I find the Respondent's actions set forth above are pretextual, the purpose of which is to disguise its intent to rid itself of a union member who engaged in protected concerted activity and who availed himself of the Board's processes.

Accordingly, I find that the Respondent has violated Section 8(a)(1), (3), and (4) as alleged in the complaint.

e. Incidents on January 3, 2007

The following is based on a single conversation between Ossefoort and Brown. The first part of the conversation is alleged to violate Section 8(a)(1). The second part contains the factual allegations concerning the January 3 employee warning report, and the events that happened after the conversation. The January 3 employee warning report is another example of discipline that was never discussed with, or given to the employee, but was discovered in the packet sent to Ossefoort by the State employment office.

(1) The alleged 8(a)(1) violation

Ossefoort testified that he went to Brown's office in the morning to discuss a vehicle Ossefoort was repairing. During that conversation Ossefoort asked Brown if he was going to lay someone off because work was slow. Brown said "the gentlemen out front bannering was not helping business and he was going to run some specials to try and get more business in the shop." Brown concluded with "you may win the battle but you are not going to win the war." Ossefoort testified that he probably said that it would be a good thing to get more business, and returned to work.

Brown admits saying "you may win the battle but you are not going to win the war," but he does not remember when he made the statement. Ossefoort demonstrated an excellent recollection of the statement and the circumstances under which it was made. I credit his testimony. I find that the nature of the statement, and the context in which it was made, conveyed the unlawful threat of futility of the exercise of the employees' rights under Section 7 of the Act, and thereby violates Section 8(a)(1) of the Act. See e.g., *Outboard Marine Corp.,* 307 NLRB 1333, 1335 (1992), enfd. mem. 9 F.3d 113 (7th Cir. 1993).

(2) The January 3 employee warning report

Brown's version of the conversation has a different ending. Brown claims that Ossefoort's question about a lay off was specific to that very day. Brown said that no one was going to be laid off because "we have training, and that you can train until maybe something will come in in the afternoon. And then he—there was probably some more conversation there, but he left and said training was a waste of time." (Tr. 559.)

Ossefoort testified that after he finished his work he asked Kingsley, the service advisor, if there was any work "that he needed to stick around for." Kingsley checked the schedule and told him there was nothing else coming in, and that there were "four other techs there at the time." Kingsley never mentioned training. It appears that Kingsley, who did not testify, may have misspoken. Eckert was absent. Thus, the four service technicians working on January 3, were Ossefoort, Anderson, Cogger, and Kinkel. (GC Exh. 125, Tr. 531.) The Respondent appears to be ambivalent as to Kinkel's position. Brown testified that he was hired as a lube technician but by this time had progressed to "brake repair and stuff." (Tr. 532.) Work that was similar to that which Brown said that Ossefoort preferred. (Tr. 533.) Coombe, testifying about the same time period, classified him as a lube technician. (Tr. 33.) In any case Ossefoort clocked out at 11:35 a.m. Kinkel punched out at 11:39 a.m., apparently without repercussion. (GC Exh. 125(e) and (c).) Brown called Ossefoort around 2:30 p.m. and told him to report to Coombe's office. Although the outcome of that meeting was Ossefoort's discharge it is undisputed that neither Ossefoort's early departure nor his failure to partake of training was mentioned at his discharge.

Brown claims he:

> went out about 2 o'clock. Two cars pulled in on the drive, and so I went out and I asked Brian [Kingsley]. I said, 'Okay, is Jim here? Is he training? There's'—you know, 'now two cars are here that he can work on one of ´em.' He said 'No, Jim went home.' Then I went up to Mike Coombe's office, told Mike. Mike told me to call him and get him back in. [Tr. 559.]

For the reasons set forth below I find Brown's scenario implausible and contrived. I fully credit Ossefoort's testimony that he left work with Kingsley's permission and that Ossefoort was not told by anyone that he should stay at work and train.

The service advisor, in addition to making the daily schedule, initially meets the customer and begins the necessary paperwork. He then assigns a service technician to work on the vehicle. The record establishes that Ossefoort, Anderson, and Cogger considered Kingsley to be

their immediate supervisor and went to him when they needed to schedule time off and to have their timecards initialed. The Respondent does not challenge Ossefoort's testimony that Kingsley gave him permission to leave. The Respondent argues only that it was not the "right thing to do" because Brown, Kingsley's superior, had allegedly told Ossefoort earlier to stay and train.

Brown's conduct and statements on seeing two vehicles arrive at the dealership are sufficiently outlandish as to be theatrical. He does not explain why he felt the need to leave his office simply because customers had arrived. Immediately on seeing Kingsley he asks "is Jim here?" Without waiting for an answer, he asks "is he training?" These are strange questions for Brown to be asking when only 2 hours before he alleges that he told Ossefoort to remain at work and train. Ironically, Brown shows no curiosity when Kingsly tells him that Ossefoort went home. He does not ask who gave him permission. He never asks if Ossefoort gave a reason for leaving. Brown apparently assumes that there could not be any mitigating circumstance, such as a family emergency, that he should ask about.

Considering Brown's story from Ossefoort's perspective, the question remains—"What was he thinking!" Why would Ossefoort ask Brown, or Coombe, for anything. Did he forget that Coombe told him in September that he was going to "fire" all the service technicians "and just hire back those that did not want the Union." *Eichorn I,* JD slip op. at 10. Did he forget that on November 15, Brown reprimanded him on a trumped-up charge for something Ossefoort, and numerous other employees, had done in the past without being disciplined. Did he forget that Brown pulled his timecard and issued him a reprimand the day after he testified at the Board hearing. Did he forget that Coombe and Brown threatened to withhold his holiday pay unless he chose the "Eichorn way." Did he think that his absence would somehow go unnoticed with only Anderson and Cogger remaining at work. Did he expect leniency, notwithstanding his reprimand for forgetting to replace the hubcaps. If discharge is considered to be industrial capital punishment, Ossefoort's conduct must be industrial suicide.

Brown admits that he recommended terminating Ossefoort on January 3 "[b]ecause he went home without authorization." (Tr. 613.) Yet he offers no explanation for not giving Ossefoort the warning report (GC Exh. 36) he had prepared on either January 3, or the following day, when Ossefoort returned to get his tools. Clearly, this employee warning report is not in Brown's category of those reports that remain in his desk for future reference. The violation is "Unauthorized Absence From the Work Area." "Dismissal" is the penalty. Brown offers no reason for not asking Ossefoort why he left after being told to remain at work and train. Brown never explains why the date at the top of this employee warning report is January 2, but the date of the violation and the date by Brown's signature is January 3. There is no explanation why Kinkel was allowed to leave a few minutes after Ossefoort, but Ossefoort was told he had to remain and train. There is no explanation why Cogger was allowed to leave at 3:41 p.m., and Ossefoort was discharged for not staying until 4 p.m.

The Respondent, in an attempt to impeach Ossefoort's testimony, argues that his affidavit does not mention another meeting between Ossefoort and Brown on January 3. Ossefoort said that layoffs were also mentioned at that meeting. Ossefoort's testimony regarding that meeting was entirely consistent with his testimony set forth above, in that he credibly and consistently denied that Brown ever told him to remain at work and train.

Based on the foregoing I find that the evidence establishes that the reasons given by the Respondent for disciplining Ossefoort for leaving work on January are pretextual—either false or not relied on—and thus the Respondent fails by definition to show that it would have taken the same action for those reasons. E.g., *United Rentals,* 350 NLRB No. 76, slip op. at 1–2 (2007).

f. Ossefoort's discharge meeting

Brown was in Coombe's office when Ossefoort arrived. Ossefoort testified that Brown gave him the CSI memo and Coombe said "do you remember seeing this." Ossefoort said "Yeah" to which Coombe replied "well your CSI scores suck along with your attitude." Ossefoort attempted to explain that many of the factors that were included in the CSI score did not pertain to his job. In response Coombe showed him a folder, but not the contents, and said "yeah, we got you written up a bunch of times too." After Ossefoort acknowledged the hubcap and timecard incidents, Coombe said "we got a bunch of stuff on you" and made a reference to laser panels. Coombe told Ossefoort that he "was the best technician he had but he had to let Ossefoort go." Coombe agreed that Ossefoort could get his tools the following day. Ossefoort testified that the meeting lasted about 10 minutes, and that he acknowledged to Coombe that he was not having fun at work.

Brown testified that Coombe said that Ossefoort's CSI scores were deplorable and that Ossefoort had a bad attitude. He confirmed that Ossefoort said that it had not been fun working there. Coombe admits telling Ossefoort that "based on your attitude and your performance and everything that's going on . . . I think it's time for us to part company." He also recalls showing Ossefoort the CSI memo but he is uncertain if he showed Ossefoort his CSI scores.

The Respondent argues that the CSI score was only one measure of performance, and that:

> [u]ltimately [the service technicians] were not terminated for violating [the Respondent's November 29 memorandum] which provided that failure to reach average CSI/SSI scores may subject one to dismissal, but rather for overall performance concerns, including low SSI scores. The specific fact that the technicians did not meet zone average was not identified by Brown or Coombe as a basis for the terminations. Low scores and downward trends were identified as one of several factors. (R. Br. at 47.)

Even so, it seems odd that Coombe felt that it was necessary to ask Ossefoort if he remembered the Respondent's month old memo stating that employees could be discharged for not attaining zone average CSI scores. Only the day before he and Brown met individually with the service technicians, ostensibly to "get information about improving our CSI scores." (Tr. 605) Coombe admitted that during those meetings he told Ossefoort, Anderson, and Cogger that he was unhappy with their CSI scores and he reminded each of them that pursuant to the memo they could be discharged for low CSI scores. (Tr. 33–36.)

Brown testified that "[w]e had already put steps in place back in December to improve our scores, and we were surprised that they had gone down. And so I guess we did—we just finished out [the January 2 meetings] and decided that we would probably discuss it another day

after we got a little more information together." (Tr. 611–612.) Brown did not indicate what steps the Respondent allegedly took in December to improve the scores and what "little more information" was needed. Obviously if Ossefoort's scores were not so deficient as to warrant his discharge on January 2, they were no worse on January 3. Perhaps Brown, in anticipation of discharging Ossefoort on January 2, wrote that date at the top of the employee warning report, and used the same report when Ossefoort was discharged on January 3.

I also find that the Respondent's contention that "zone average" was not identified as a basis for terminations is inconsistent with its documentary evidence. On January 3, Brown prepared a "write-up" of Ossefoort's dismissal. The third sentence states, "Jim's C.S.I. scores are the worst of the dealer and below the Zone average." Brown and Coombe signed the write-up. (R. Exh. 12.)

I also find this statement is inaccurate and is evidence of the Respondent's disparate application of its discipline policy based on the union activity. Coombe admitted that service technician Wade Eckert's CSI scores were the lowest of all the service technicians. All of Eckert's scores were below the zone average in November and December and they did not improve from November to December. (GC Exh. 6 at 52, Tr. 66–67.) Eckert was not an open and active union supporter. At most, on two occasions he was bannering for no more than 15 minutes, and there is no evidence that the Respondent was aware of even that minimal activity.

Coombe explains this disparity by claiming that Eckert was "training." Brown's testimony amply demonstrates the disingenuousness of Coombe's statement. Brown admits to paying Eckert the same rate as Cogger based on Eckert having twice owned automobile repair shops. The record also demonstrates that the Respondent had at least some confidence in Eckert's ability. As will be seen below Eckert was assigned to work on the Niemala Financial Services vehicle on the third time it returned to the shop for repairs. (See section 2a below.) Commonsense dictates that a neophyte would not be assigned to repair a vehicle on its third trip into the repair shop.

The Respondent's next contention is even more improbable and less creditable. The Respondent argues that Eckert was retained and Ossefoort, Cogger, and Anderson discharged because his scores were "going up" and their's were "going down." Aside from the obvious point—that trends are not facts, it should be noted that the Respondent never told the employees that they would be discharged if their scores went down. Such an announcement would, perforce, cause great anxiety among those employees, such as the discriminatees, who had achieved scores of a 100 percent. In any case, in order to accept the Respondent's story as true it must be believed that the Respondent would discharge its three most experienced service technicians, but retain a "trainee" with the hope that his scores might eventually exceed the level of those at which the more experienced service technicians were currently working. Additionally, no credible explanation is forthcoming from the Respondent as to the urgent need to discharge all three of its most experienced service technicians in lieu of waiting at least until Eckert had demonstrated his ability to attain, or surpass, the level of one of their CSI scores.

I find that the reason offered by the Respondent for discharging its three most senior and experienced service technicians because of their CSI scores while retaining a less senior and less experienced employee is false. I find that the disparate treatment is predicated on the employees'

union activities and as such violates the Act. E.g. *Success Village Apartments,* 348 NLRB No. 28, slip op. at 22 (2006).

Additionally, Coombe agreed with the General Counsel's representation that he terminated Ossefoort because of "his low SSI scores from the December, 2006 report, his attitude, his come-back repairs and because he left work when he was told to train." He disagreed when the General Counsel asked if it was not true that the final incident in his decision to terminate Ossefoort was Ossefoort's December 2006 CSI/SSI scores.

In response to Coombe's denial the General Counsel offered a single page form, apparently from the Minnesota Department of Employment and Economic Development, the purpose of which is to "raise an issue." (GC Exh. 10(d).) The form is signed by Billie J. Taylor, the Respondent's office manager, whom Coombe admitted was authorized to complete the document on behalf of the Respondent. (Tr. 41.) Brown admitted that Taylor completed the form based on information he provided, and that the form was submitted to the Minnesota Department of Employment and Economic Development for the unemployment cases against Ossefoort and the service technicians. (Tr. 544, 548–550.)

I admitted the document over the Respondent's objection, with leave to the parties to argue the issue in their posthearing briefs. The Respondent admits that the document was provided pursuant to a subpoena requesting Ossefoort's personnel file. The Respondent argues, however, that Minnesota Statutes §268.105 precludes the use of testimony obtained in unemployment compensation hearings for any purpose, including impeachment, in any other proceeding. The General Counsel argues that it is only testimony obtained in a hearing before an unemployment law judge that may not be used in any other proceeding. Because the document is not testimony, the General Counsel contends, it is admissible as an admission by a party opponent. I agree with the General Counsel's distinction and affirm my ruling. Accordingly, it is unnecessary to consider the applicability of Minnesota Statutes §268.105 to the Board's proceedings.

The significance of the document is that the written information was provided by Brown. It is he who testified that Coombe told him to call Ossefoort back to the office after Brown recommended Ossefoort's discharge for not remaining at work contrary to his instructions. After the question "Why did you fire the applicant? "Unacceptable customer satisfaction scores via General Motors," is written. In response to "What was the final incident? The answer is "Receiving Dec. scores." The date for the receipt of the scores is "12-20-06" and the explanation offered for the lapse of time between the receipt of the scores and the discharge date of "1-3-07" is "I wanted to give it thought & wait until after the holiday." The form is signed and certified "to the best of my knowledge" as "true and correct," by Billie J. Taylor on January, 18, 2007. The fact that Brown dictated the information regarding the cause of Ossefoort's discharge, without any mention of Ossefoort's early departure from work, is additional evidence of Brown's mendacity.

Moreover, the General Counsel persuasively argues that a thorough review of Ossefoort's scores reveals that the Respondent's reliance on them as reason for discharge is without merit and pretextual. As found above, the December scores represent work performed in August, September, and October. Thus Coombe discharged Ossefoort well before he could have known if Ossefoort's scores had improved.

The General Counsel also contends that the representative survey sample, only individuals who had warranty work done on their vehicle, is very small. Thus, Ossefoort's 3-month scores are based on only nine customer surveys (42 percent of the recipients) and his 12-month results on only 16 replies (44.8 percent). The General Counsel also submits that Ossefoort's scores were not unsatisfactory. His 3-month score for "percent of all service concerns corrected," is 100 and his 12-month score is 90.9 percent. Both are above the zone average. His "fixed right this service visit" scores for the 3-and 12-month periods are between "very" and "completely" satisfied. (GC Exh. 6 at 55.) Additionally, a comparison of the "Service Technician Performance Summary" from November (GC Exh. 14) to December (GC Exh. 6 at 52) shows that Ossefoort improved in all areas save for those where he was already at 100 percent, thus his CSI scores were trending up. (Tr. 22–30.)

Other than Coombe's cryptic, your "attitude sucks" there is no credible evidence that Ossefoort's attitude was ever the cause of any discipline. Yet the Respondent now contends that Ossefoort's discharge is a direct consequence of his attitude. Attitude is subjective. For instance, some of the examples of Ossefoort's bad attitude offered by the Respondent may also be viewed simply as Ossefoort's legitimate desire to receive compensation for his efforts. Ossefoort admits being reluctant to help less skilled technicians when he had his own work. Ossefoort credibly testified that he was reluctant because under the Respondent's compensation system he would not have been paid for the time he was helping other employees. Ossefoort asked Brown to promote him to shop foreman and then he would be paid for training the other service technicians. The most significant factor in determining the genuineness of the Respondent's concerns is the lack of any direct evidence that Ossefoort ever received even a verbal warning regarding his attitude. The following example demonstrates the Respondent's apparent lack of concern for Ossefoort's bad attitude. Brown testified that Ossefoort once told him that if "Coombe would get his head out of his ass, then everything would be done." Not only is there no evidence that Brown made any response, but be testified that he did not even remember when the statement was made. (Tr. 557–558.)

"It is well settled that an employer's reference to an employees 'attitude' can be a disguised reference to the employee's protected concerted activity." *Rock Valley Trucking Co.,* 350 NLRB No. 10, slip op. at 2 fn. 6 (2007) (citation omitted). Coombe admits telling Ossefoort that "based on your attitude and your performance and everything that's going on . . . I think it's time for us to part company." During that time "bannering" was one of the "things going on" and Ossefoort was a participant. It was also less than 2 months after Ossefoort testified in *Eichorn I*. When Coombe's statement is considered together with those facts, as well as the total lack of credible evidence of any discipline, I conclude that Ossefoort's "attitude" as a cause for his discharge is yet another makeweight reason.

I find additional evidence of animus in the Respondent's distortion of the offenses Ossefoort is alleged to have committed. When Brown wrote Ossefoort's reprimand for writing his time on the timecard he checked the "other" box under "Type of Violation" and wrote in "time clock." In the "Supervisor's Statement," he wrote "Checking time tickets. Found that Jim had written in his time & also on his punch card." His testimony concerning why he reprimanded Ossefoort was the essence of clarity. Ossefoort's offense was that "he wrote in the time that he was working on a vehicle and rather than using the timeclock," and that "is not proper."

Notwithstanding the Respondent's position on the use of unemployment compensation filings, the Respondent felt it necessary to offer a multipage packet of documents, allegedly prepared by Brown. Coombe identified the packet as "information to determine whether unemployment benefits are chargeable against Eichorn Motors for an employee being terminated." (Tr. 75.) The Respondent contends that the packet establishes that its position at the unemployment compensation hearing regarding the reasons for Ossefoort's termination are consistent with those presented here. The packet was admitted over the General Counsel's objection. (R. Exh. 1.)

The packet consists of approximately 40 pages, most of which are duplicate work invoices, containing Ossefoort's employee number. Ossefoort's warning report for the "time clock" violation of "writing in his time" is located in the middle of the packet and the warning report for "Unauthorized Absence From Work Area," is at the end. The second sheet of the packet contains 2-typed paragraphs, with Brown's signature beneath the typing. The paragraphs are apparently in response to questions written on the front sheet of the packet. The discrepancies between Brown's testimony and the paragraphs are not as surprising as the misrepresentations of Ossefoort's alleged violations.

Thus Brown avers that Ossefoort was, "written up for forging his time card . . . . This was an act of fraud." This statement is a gross distortion. "Forgery" and "fraud" were not spoken in connection with this incident. Although there is no box labeled "Fraud" on the employee warning report there is a box labeled "other," and that is were Brown wrote "time clock." (GC Exh. 29.) Brown took fraud "seriously." (Tr. 626.) He was also well aware that he could have written "Fraud" in the "other" box, as he had done on a warning report that he wrote about Cogger, and which will be addressed later. (GC Exh. 45.) He did not. He knew that Ossefoort's conduct was neither a fraud nor a forgery.

An even more damaging misrepresentation is the designation of the pretextual reason given for Ossefoort's unauthorized absence from the work area as "insubordination." Insubordination is one of the most egregious offenses an employee can commit. It is normally predicated on a direct refusal to perform an assigned work task. E.g., *Tri-Tech Services,* 340 NLRB 894, 901 (2003). The penalty is usually immediate discharge.

At the hearing the use of the phrase "refusal to obey a direct order" resulted in an instant objection by the General Counsel as a misstatement of the testimony. The objection was sustained. (Tr. 684.) Other than that incident there was no contention made that Ossefoort's conduct was anything other than an unauthorized absence from the work area. Brown checked the box labeled "Unauthorized Absence From Work Area" and left blank the box marked "Insubordination" on the employee warning report. (GC Exh. 36.) As set forth above, I have found that the entire scenario proffered by Brown regarding this incident is fabrication.

I find that the foregoing distortions were intended to enhance the Respondent's case for denying Ossefoort's unemployment compensation claim. I further find that the misrepresentations are additional evidence of the depth of Respondent's animus towards Ossefoort's protected activities and his use of the Board's processes. *Diamond Electric Mfg. Corp.,* 346 NLRB 857, 862 (2006).

Based on all the foregoing I find that the reasons given to Ossefoort on January 3 for his discharge are not true. Both the "poor performance," presumably evidenced by the CSI score, and the unidentified "bunch of stuff" are pretexts, offered to disguise the real reasons for his discharge—his union and protected activity and his participation in the Board's process. Aside from crediting Coombe's statement concerning "everything that's going on," I fully credit Ossefoort's testimony. In addition to his credible demeanor, he exhibited excellent recall and his detailed testimony was given in an honest and straightforward manner. Brown's description of Ossefoort's leaving after being told to remain and train is incredible and not worthy of belief.

g. The alleged threat on January 4

The following morning Ossefoort went to the dealership to get his tools. He also asked for and received a copy of the laser panel repair order from Brown. This fact is consistent with, and supports, Ossefoort's testimony regarding the discharge meeting. Ossefoort testified that as he was leaving he told Brown "I guess you got what you wanted. You got rid of me." Ossefoort said that Brown replied "It's not what I wanted. It's what we want. Team players." With that Ossefoort left. Brown admitted that "I have probably made statements about team players several times," but he did not remember making the statement on that day. I credit Ossefoort's specific recall and find that the statement was made as he testified.

In considering statements made by a supervisor to an employee, the Board applies the "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." E.g., *Miller Electric Pump & Plumbing,* 334 NLRB 824, 824 (2001). Further, "an employer violates Section 8(a)(1) of the Act if its conduct may reasonably be said to have a tendency to interfere with the free exercise of employees rights." *Unbelievable, Inc.,* 323 NLRB 815, 816 (1997).

The General Counsel persuasively argues that within the context of the Respondent's concerted efforts to undermine the Union by unilaterally changing the employees' terms of employment, bypassing the Union and dealing directly with the employees, and threatening employees that they had to chose the "Union way" or the "Eichorn way," Brown's "team player" comment could reasonably tend to coerce employees in the exercise of their Section 7 rights. See *Edy's Grand Ice Cream,* 323 NLRB 683, 692–693 (1997), enfd. 140 F.3d 684 (7th Cir. 1998); St. Luke's Hospital, 312 NLRB 425, 438 (1993). Accordingly I find that the Respondent violated Section 8(a)(1) as alleged in the complaint.

h. The January 15, 2007 employee warning report

Not only was this report never discussed with, or given to Ossefoort, it was written almost 2 weeks after his discharge. Once again it was unknown to Ossefoort until he discovered it in the packet he received from the State employment office. On the report Brown wrote under the supervisors comments, "It has come to my attention that Jim has been moonlighting on employee vehicles. RJ McDonald's car." The consequence is "dismissal." (GC Exh. 35.)

The Respondent offered no direct evidence in support of this discipline. The parties seem to agree that moonlighting is when a service technician repairs a vehicle, not owned by a family

member, in the shop, on his own time, for money. Ossefoort credibly testified that he was not paid when he helped McDonald repair his vehicle.

The Respondent offers no argument on this issue other than a general attack on Ossefoort's credibility. Ossefoort answered "No" when asked if he had ever been disciplined for moonlighting when he was employed by Swanson. After showing Ossefoort a warning notice for moonlighting Ossefoort responded "That happened back in ´01." The General Counsel's objection on relevance was overruled. The Respondent argues that Ossefoort's denial is a reason to generally credit Brown's testimony over Ossefoort's. I find that Ossefoort's answer does not adversely impact on his credibility. The incident in 2001 alleges that Ossefoort was paid for his help. The credited and unrefuted evidence regarding the current incident is that he was not paid. I can ascertain no motive for Ossefoort to prevaricate. I find it far more probable that Ossefoort answered the question too quickly and did not immediately remember the warning issued in 2001.

Once again there can be no question that the discipline is pretextual, especially when viewed as a post hoc attempt to rationalize the Respondent's January 3 discharge. *Inter-Disciplinary Advantage, Inc.,* 349 NLRB No. 49, slip op. at 30 (2007). The General Counsel also observes that this discipline issued only 3 days after the charge in Case 18–CA–18276 was filed by the Union. That charge alleges that the terminations of Ossefoort, Anderson, and Cogger violate Section 8(a)(1), (3), (4), and (5) of the Act.

i. Reasons advanced at the hearing for Ossefoort's discharge

(1) Events surrounding the Niemala Financial Services vehicle

Brown stated that on November 7, a customer claimed that his vehicle was having a problem with the ABS light. The customer thought that a missing clip might be the cause. Brown claims that he asked Ossefoort why, when he worked on the vehicle in September, he had not found that the clip was missing. Ossefoort testified that the only time he recalled working on the vehicle was the last time it was at the dealership which was when he installed a clip on November 7. Cogger, however, testified that Ossefoort worked with him the first time the vehicle came in for repair. Cogger's testimony was not based on his recollection, but on the fact that Ossefoort's employee number, 202, was listed next to Cogger's number, 149, on invoice. (Tr. 301–302, GC Exh. 41.) Ossefoort's number is also on a few time tickets pasted on the back of the work order. (GC Exh. 85.) However the Respondent offered the invoices for the repair work on the Niemala vehicle. (R. Exh. 10.) These invoices also contain a narrative, written by Taylor but dictated by Brown, as to what service technicians worked on the vehicle. Notwithstanding the fact that Ossefoort's number is on the invoice that covers the repair work from July 5 to September 15, he is not mentioned in the narrative until the invoice dated November 7. ((R. Exh. 10(h).) This is also consistent with the first page of the packet which appears to be a summary of the repair history of the vehicle. (R. Exh. 10(a).) Brown testified that the notes were made in order to contest Ossefoort's unemployment compensation claim.

Assuming that Ossefoort is incorrect, and that he did work on the vehicle in September, there is no evidence that it was his responsibility to have discovered the missing clip. In fact, as set out below, it was Cogger who noticed that the clip was missing. The most telling evidence that Ossefoort had nothing to do with the clip is that Brown made no mention of Ossefoort and

the clip in the notes that Brown dictated to Taylor to justify denying Ossefoort's claim for unemployment compensation claim. The record demonstrates that Brown was not at all reluctant to find fault with Ossefoort, be it real or imagined. I find it highly implausible that Brown would neglect to make note of any error that could even remotely be attributed to Ossefoort.

Moreover Brown contends, contrary to Ossefoort's credible denial, that he had a conversation with Ossefoort about this incident. Once again Brown only testifies, in general terms, as to what he said and never offers any evidence that Ossefoort participated in the "conversation." I also note that this incident provides additional evidence of Brown's lack of credibility. According to him there was a customer complaint and yet the Respondent offers no evidence of a signed or unsigned employee warning report. I find that Respondent's contention that this alleged incident contributed to Ossefoort "poor performance" is a pretext.

(2) Events surrounding the Lutheran Social Services vehicle

Brown states that in December Ossefoort came to him and said that he had replaced the module on this vehicle but still did not get a signal. Brown clams that Ossefoort replaced the module rather than repairing the circuit that caused the signal not to get to the module. (Tr. 551.) When asked by the Respondent's counsel if he spoke with Ossefoort about his concern regarding Ossefoort's work on the vehicle, Brown replied, "Yeah, I asked him why he replaced the module." "And what did he say?" "That he thought that was the problem." Brown claims that Ossefoort's incompetence resulted in the Respondent having to pay $720 for a part

In contrast to Brown generalized conclusions, Ossefoort presented detailed testimony why he replaced the module, the difficulty in diagnosing the problem, and how he ultimately discovered the problem. (Tr. 227–228, 252.) He consistently denied talking with Brown about this incident. When considering this incident with Ossefoort's forgetting to replace hubcaps, which also happened in December, I find it telling that the Respondent does not offer the ubiquitous employee warning report to support its contention and Brown's testimony. Based on the foregoing, in addition to Ossefoort's credible testimonial demeanor, I find that this is another example of the Respondent's use of a pretext to justify Ossefoort's discharge.

(3) Prior discipline

Over the General Counsel's objection the Respondent was permitted to introduce two written warnings issued to Ossefoort by Walberg when they were employed by Swanson. The first is dated April 16, 2001, and was addressed above in connection with the Respondent's attempt to justify it's discipline of Ossefoort for moonlighting.

The second is dated February 10, 1999, and was Ossefoort's first warning for "careless and sloppy work" because he forgot to check the oil level after changing the oil. (R. Exh. 3.) In its brief the Respondent argues that Ossefoort's August 21, 2006 (GC Exh. 25) reprimand for substandard work is evidence that Ossefoort's "performance problems continued." Even were I to ignore my finding that the 2006 reprimand is a pretext and that there is no credible evidence that Brown spoke to Ossefoort about the incident, I would still reject the Respondent's contention. Two remands issued over 7 years apart cannot realistically be considered as evidence of an ongoing problem.

The General Counsel also argues that the Respondent has offered no evidence that either reprimand was relied on as a reason for Ossefoort's discharge. Moreover, Ossefoort as well as Cogger and Anderson, were each hired—unconditionally—by Coombe. These men were not unknown. Coombe obviously had their Swanson personnel files available for review, and Walberg, their supervisor was employed by the Respondent. For the Respondent to now argue that these dated reprimands somehow influenced its decision to discharge these men, especially in light of the overwhelming evidence of animus, is evidence of blatant pretext. *Metropolitan Transportation Services,* 351 NLRB No. 43, slip op. at 2–4 (2007).

As set forth above, I find that the reasons offered by the Respondent for discharging and disciplining Ossefoort are pretextual, advanced solely to mask the real reason for its action, which was Ossefoort's protected concerted activities and his participation in the Board's processes. Accordingly, I find that the Respondent has violated Section 8(a)(1), (3), and (4) of the Act as alleged in the complaint.

2. David Cogger

Cogger was employed by the Respondent from June 2006, until his discharge on January 5, 2007. He had previously been employed by Swanson for about 5-½ years. He worked as a service technician for both employers, with a specialty in engine repair. His job duties remained the same after he was hired by the Respondent. Cogger testified that his immediate supervisor was Kingsley.

a. The November 8 employee warning report

On November 8, Brown signed a employee warning report for Cogger. (GC Exh. 40.) The violation is "poor work quality" and the "date of violation" is November 6. The supervisors' statement is "since engine repair customer has had several concerns with quality of work performed from ABS light on and to [sic] engine she has returned 3 times since engine repair." The vehicle is a 1998 Cadillac Deville that has been driven for 115,834 miles that is owned by Niemala Financial Services. Brown testified that it was "the quality of the work that was performed" on the vehicle that caused him to complete the employee warning report. Notwithstanding his alleged motive he never discussed the report with Cogger. Cogger only learned of its existence when he received his packet from the State employment office in mid-January 2007.

The vehicle was in the shop for repairs four times between July 5 to November 6. Cogger was the primary service technician who repaired the vehicle on the first visit. The invoice for the first visit has his employee number listed first (149) and then Ossefoort's number, 202. (GC Exh. 41.) Based on the repair order it appears that Anderson, employee number 203, also contributed. (GC Exh. 85a–b.) On the initial visit Cogger replaced the pistons, rings, bearings and cylinder heads in the engine. Cogger testified that this was the only time that he worked on the vehicle and his testimony is supported by the Respondent's invoice records only showing Cogger's employee number on the September 15 invoice. (GC Exh. 41–44.) The vehicle was in the shop from July 5 until September 15 on the initial visit. The parties agree that at least part of that time is attributable to the Respondent not having the necessary repair parts in stock.

The vehicle was returned to the shop on September 18. This time star washes were installed to keep the connection on the battery from coming loose. Anderson did the repair and the customer was charged $177.49. Cogger credibly testified that he did not install the ground cable wire incorrectly, and that he did not recall any discussion with Brown regarding a cable wire. The vehicle returned again on September 20. This time the vehicle needed to have the "02 sensor" replaced. Cogger testified that when he worked on the vehicle there was no problem with the "02 sensor." Eckert diagnosed the problem, but the customer declined to have the work performed. The vehicle was released on September 27, and returned on November 6. (R. Exh. 10 g–h.) The complaints on the final visit were that the auto start was not working, the clip was missing from the EBCM connection and thereby disabling the seat heaters, the rear window defrost was inoperable, the heater/blower did not change positions, and the vehicle was chugging and sputtering when driven at 40 miles per hour. Cogger testified that none of those problems existed when he worked on the vehicle. He credibly testified that when he worked on the engine he observed that the clip was missing from the EBCM connection. He testified that the clip assures that connection does not separate because of engine vibrations. Cogger testified that the clip could not be replaced because none were in stock. He also observed that the connector was staying together without the clip.

Brown testified that he spoke to Cogger in late September about the time it took to repair the vehicle and the quality of work in reassembling the vehicle. Brown claims that Cogger took over 2 months to finish a 3-day job. Brown admits that the initial delay was because the customer's permission had to be obtained before the parts could be ordered. Thereafter, according to Brown, it was because Cogger ordered parts piecemeal, and did not follow the service manual. I find that Brown's testimony is exaggerated. I find it incredible that he would stand by and watch Cogger order parts in such a manner that it would take him over two months to complete a 3-day job. I also find that regardless of the substance of his conversation with Cogger concerning timeliness, it had nothing to do with the reprimand. Moreover, it is evident that the length of time for the repair was not of sufficient import for Brown to even draft a "personal" memorialization of his conversation with Cogger. Brown did not testify, or in anyway indicate, that he warned Cogger that there would be any additional consequences resulting from this timeliness issue.

Brown contends that when the repairs were completed he was asked to road test the vehicle because the repair bill was $5973.40. He claims that on the test drive the ABS light came on and the engine stalled. Brown states that "I brought it in for that. He [Cogger] couldn't figure out what was wrong with it, so I'm not sure if Jim Ossefoort or Robert Anderson worked on it." Based on the test drive Brown testified that Cogger "should've double-checked his work." Brown, however, also agreed that the point of a test drive is to ensure that the vehicle is fixed correctly before it is released to the customer. He did not reconcile his statements.

Brown's statement that it was he who "brought it in for that," appears to be inconsistent with the notation contained on the copy of the invoice that the Respondent submitted to the State employment office. That notation states that the customer "came back a few days later." (Tr. 570, R. Exh. 10b.) When the vehicle returned on September 18, it was assigned to Anderson, who corrected the stalling problem. The ABS problem was corrected by Ossefoort on November 7.

Cogger credibly denied that Brown ever spoke to him about his "poor work quality." Contrary to Brown's statement Cogger never testified, and was never asked, if he was unable to repair the vehicle. The only employee number on the second invoice is Anderson's. (GC Exh. 42.)

Even if Brown's testimony, that he spoke with Cogger on September 15 or 19 is credited, that is still almost 2 months before he wrote the warning report. He knew, when he allegedly spoke with Cogger, that the vehicle would be returned to have the ABS light fixed. Brown claims that he wrote the employee warning report on November 8 because it was the fourth time the vehicle was brought in for repairs. He offers no explanation why, if he really believed that those additional visits were required because Cogger did not check his work, he did not reprimand Cogger on September 15. Nor does he explain why he did not tell Cogger about the employee warning report, give him a copy, and allow him to respond in writing on the report.

In any case, I credit Cogger's testimony that Brown never spoke with him about his poor work quality on this vehicle. In addition to Cogger's demeanor, I note that had Brown talked to Cogger about this vehicle, especially the missing clip, he clearly could have absolved Ossefoort of any wrongdoing.

I find that the reasons advanced by the Respondent for disciplining Cogger on November 8 are pretextual. This conclusion is based on the fact that Brown never spoke with Cogger about his alleged poor quality of work, the fact that Brown wrote the employee warning report almost 2 months after the alleged poor work performance, the fact that Brown never told Cogger that the employee warning report existed, and the fact that Brown never gave Cogger an opportunity to defend himself. Accordingly, I find that the Respondent's true reason for writing the employee warning report was because of Cogger's union and protected activities. Accordingly, I find that the Respondent has violated Section 8(a)(1) and (3) as alleged in the complaint.

b. The November 10 employee warning report for lateness

On November 5 and 6, Cogger covered the time stamped on his weekly timecard with white out and wrote in "8:00." Cogger said that he started work at 8 a.m. on those days, but had punched in at a later time. Cogger explained his actions by stating he was having difficulty with a job and that resulted in him taking more time to finish the job than the predetermined amount that the job paid. Thus, he changed the time to reflect the hours he actually worked. This would allow him to earn base pay for all hours worked instead of bonus pay for the hours produced. Cogger testified that although his weekly timecard for November 4 is stamped at 8:43 a.m., that was when he was assigned work. He was actually at work at 8 a.m. Similarly, on November 9, he started his assigned work at 8:12 a.m.

On the morning of November 10 Brown and Coombe gave Cogger an employee warning report. It was dated November 10 and the violation was "Lateness/Early Quit." Brown wrote "Dave has been late all week long. He has also modified his time card and time stamps." The consequence for failure to improve was "Dismissal." Brown asked Cogger why he changed his timecard. Cogger, "tried to explain the working off the clock deal and then changing it for base pay purposes. Being I was there I didn't think it would be a problem." Brown and Coombe told him that for insurance reasons he was not to do it again. Cogger signed the warning and went to

work. At the hearing Brown stated his concern as "why would you white out the time and write in a different time? So it leads me to believe that he's trying to—well, I don't really know what he's trying to do there. I mean why would you white out a clock time?" (Tr. 577.) Notwithstanding his failure to comprehend Cogger's reason, Brown issued him the warning.

This incident, regarding the pay, was previously addressed when Cogger used it as an example of how an employee could earn less under the Respondent's unilaterally instituted wage scale. (See section C.) Brown's testimony appears to imply that even he believes that a covert scam, which involves writing over white out on a timecard punch, is somewhat unrealistic. Had Brown not been so anxious to reprimand Cogger he might have discovered that Cogger was just doing what he, and the other employees, had always done under the prior wage plan. The weekly timecards of Ossefoort, Conrad, Cogger, Anderson, and Wakefield all have written times. (GC Exhs. 91–100.) Not only is there no evidence that the employees were disciplined for these modifications, but Walberg credibly testified that he allowed the practice on the weekly and daily timecards as part of the incentive program that he devised. The difference is that under the Respondent's unilaterally imposed changes to the wage plan, the Respondent no longer pays a base rate for hours worked. Thus, Cogger's action was meaningless. Indeed, it was this incident that apparently made the service technicians aware that the Respondent had made changes to the wage plan, or at least the monetary impact of the changes. As Walberg's testimony makes perfectly clear he routinely allowed the employees to make changes to both timecards. Had the Respondent not unlawfully changed the wage plan, Cogger actions would have been commonplace, as amply established by Walberg's testimony, as well as the documentary evidence.

Additional evidence of the Respondent's haste to find fault with Cogger is Brown's written statement that Cogger "has been late all week long." As set forth above, Cogger credibly testified that he was at work by 8 a.m. the entire week beginning on Monday. He punched in at 8:43 a.m. on Monday, and 8:12 a.m. on Thursday, because those were the times when he actually began to perform work. Not only do I find his explanation credible, it appears that the Respondent does also. Cogger's 2006 absentee calendar contains no indication that he was late during the week starting on Monday, November 6. The calendar does indicate that he was tardy the previous week, although it does not indicate how tardy. (R. Exh. 13.) The Respondent offers no explanation as to why it waited a week to reprimand Cogger for his tardiness. I conclude that Brown hastily added the tardiness issue as yet another makeweight reason to discipline Cogger. *Desert Toyota,* 346 NLRB 118, 120 (2005).

The warning indicates that the date and time of the violation is November 10 at 8 a.m. Cogger testified that Brown handed him the warning as soon as Cogger arrived at work. Obviously, Brown had prepared the warning notice before he and Coombe spoke with Cogger. It is also clear that their minds were made up, and that they had no intention of either not issuing the warning or removing the threat of dismissal, regardless of Cogger's explanation. Brown admitted not understanding Cogger's explanation, and yet he made no attempt at clarification or inquiry.

Based on the forgoing, as well as the extensive evidence of union animus exhibited by the Respondent, I find that the reasons offered by the Respondent are pretextual, and I conclude that the real motive for the Respondent's action against Cogger is his union and protected activity.

Accordingly, I find that the Respondent has violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint.

c. The November 10 employee warning report for fraud

Cogger credibly testified, without refutation, that he was never told about this warning report. He first learned of it when he opened his unemployment packet from the State employment office in mid-January 2007.

Cogger credibly testified that he remembered working on the "Wilson" vehicle in August 2006. The Wilson vehicle is the subject of the warning report. (GC Exh. 45.) Cogger specifically recalled that the parking brake needed adjustment. The adjustment cables were rusted and in order to move them they had to be heated with a torch. When he could move them he adjusted them to the fullest extent. Cogger noted this fact on the back of the repair order. He also noted that the rod was bent and would need to be replaced if further adjustment was required. Cogger credibly testified that he told Kingsley that if the customer was not satisfied with the adjustment of the parking brake, the cable would have to be replaced. His testimony is not rebutted. When the vehicle was brought back, on September 18, Cogger replaced the brake cables. Cogger testified that when the vehicle returned he explained the problem to Brown. They decided to replace all the brake cables, as well as performing other repair work. Cogger credibly testified that he did not recall Brown expressing any displeasure with his work on the vehicle.

Brown stated that he did not believe that Cogger adjusted the parking brake in August because when he examined the brake cable on September 18 it was rusted solid. Based solely on this alleged observation, on November 10, Brown prepared a warning report alleging that Cogger committed "Fraud" on August 21, because "customer was told park brake was adjusted/September 18 park brake cable adjuster had to be replaced due to rust and unable to adjust." Although Brown testified that fraud is serious, he never completed the warning form and he never mentioned anything to Cogger. He claims that he did not ask Cogger to sign the discipline form because it was just for his records, and he "still hadn't gotten to know Dave." At that point in time Cogger had worked for Brown since mid-July. On the same day that he accused Cogger of fraud, he reprimanded him for being tardy—when he was not, and for writing on his timecard, although Brown did not understand why. If Brown truly believed that Cogger committed a fraud by having the customer pay for a work that was not done, Brown should have made restitution to the customer, less he be viewed as guilty of perpetuating the fraud. Brown did not explain how many fraudulent bills Cogger would be allowed to submit before Brown "got to know him." I find Brown's testimony regarding this incident, as well as generally, to be totally incredulous. Once again I find that the Respondent's proffered reason for the discipline is a pretext and that the true motive was Cogger's union and protected activity. Accordingly, I find that the Respondent has violated Section 8(a)(1) and (3) as alleged in the complaint.

d. Cogger 's discharge meeting

Towards the end of the workday on January 5, 2007, Kingsley told Cogger to report to Coombe's office. Brown was present when Cogger arrived. Coombe gave Cogger a copy of the graph of Cogger's "Fixed right this visit score," and the CSI memo. Cogger told Coombe that he remembered the memo. Coombe told him that his "scores are unacceptable and we are parting

ways." After a couple of minutes of silence the participants left the office. Brown's testimony of the meeting is consistent with Cogger's. (Tr. 617.) Brown and Cogger testified with certainty. Coombe stated that he thought that he listed attitude, performance, scores, and that Cogger and the Respondent were not going in the same direction, as reasons for Cogger's discharge. I credit Cogger's and Brown's definite recollections over Coombe's less than certain response.

The General Counsel persuasively argues that documentary evidence supports the finding that Cogger was only given his test scores as the one reason for his discharge. In that regard the General Counsel offers the Respondent's admission that on November 29, Coombe told the service technicians that they could be discharged for below average CSI scores and that they had 30 days to improve their scores. The December scores were received in the latter part of December. Based on the credited evidence those CSI scores are indicative of the work that was performed during August, September, and October. On January 2, 2007, Coombe again told Cogger that he was not satisfied with his scores and that he could be discharged for low scores. At that time Coombe also presented Cogger with a copy of his "fixed right this visit," score which was above the zone average. (GC Exh. 9.) Only 3 days later Coombe discharged Cogger because of his low test scores.

As with Ossefoort's discharge, the Respondent documented the reason for Cogger's discharge—his low CSI scores—to the Minnesota Department of Employment and Economic Development. The format of the document is identical, and wording used by the Respondent is similar, if not identical, to that used in Ossefoort's document. (Compare GC Exh. 10(d) with 55.) The General Counsel also argues that the Respondent's reliance on Cogger's CSI scores are equally as baseless and pretextual.

As explained above, the December scores are not relevant to the issue of Cogger's (or Ossefoort's and Anderson's) performance from November 29 to January 3. The seize of the survey sample is also suspect. Cogger's 3-month scores are based on the responses of only 5 customers, or 45.5 percent of those surveyed, and the 12-month results are based on 45.8 percent of those surveyed. (GC Exh. 14 at 53.) Moreover, Cogger's scores do not appear to be deficient. His "percent of all service concerns corrected," scores are 100 percent, which is 10 points above the zone average. (GC Exh. 14 at 53, 49.) Cogger's 12-month score for "fixed right this service visit," is also above the zone average. Although his 3-month score is below the zone, it still meets the "very satisfied," level. (GC Exh. 59.) Similarly, his "overall dealership visit" scores are between 'very satisfied" and "completely satisfied," on the scale. (GC Exh. 59.)

In view of the foregoing, I find that the Respondent's reliance on Cogger's CSI scores as the reason for his discharge is a pretext. I find that the Respondent's true motivation for discharging Cogger was his union and protective activities as well as his participation in the Board's processes by his giving testimony in the *Eichorn I* hearing on November 14, 2006. Accordingly, I find that the Respondent has violated Section 8(a)(1), (3), and (4) as alleged in the complaint.

e. Reasons advanced at the hearing for Cogger's discharge

(1) The June 9 employee warning report

On June 9 Walberg issued Cogger a warning for carelessness. Cogger admitted accidentally breaking a solenoid while removing a transmission pan. He believed that the accident was a result of his "trying to make time." The warning indicates that a failure to improve would result in a suspension.

The Respondent argues that based on that warning notice, "Brown was aware of Cogger's carelessness and poor workmanship on that job based on his review of the technicians files." (R. Br. at 22–23.) I disagree with the Respondent's characterization. Brown merely acknowledged that he "went through the technician service files," and as a result, "became aware of this warning." (Tr. 567.) The warning contains nothing about "poor workmanship." Accordingly, it cannot be used as a predicate for the warning notice that Brown wrote but never gave to Cogger, concerning the "Niemala" vehicle. In that warning (GC Exh. 40) the box located in the "Violation" section labeled "carelessness" is not checked. Brown checked the box marked "other" and wrote "poor work quality." The "previous warning" section is blank, as is the "action to be taken." Brown did not offer any reason why he did not reference the previous warning in the warning he wrote. Cogger credibly denied that Brown ever mentioned "poor work quality"to him. Moreover, Brown did not mention either the Niemala vehicle or the June warning, as reasons he recommended Cogger's discharge. (Tr. 616.) I find that the only significance of this warning is as additional evidence of how strongly the Respondent wanted to be rid of Cogger because of his protected activities and participation in the Board's processes.

(2) Cogger's suspended drivers license

In the fall of 2006, Cogger's drivers license was suspended for 54 days. Brown admitted that Cogger had informed Kingsley, who Cogger considered his supervisor, of that fact. When Brown is asked how the suspension impacts on his evaluation of Cogger he responds, "It tells me that as a representative of Eichorn Motors he didn't have any concerns as far as looking good as an employee." Without commenting on the lucidness of the answer, I observe that there is no evidence that Brown offered this opinion to Coombe as a reason for Cogger's discharge.

Coombe appears to claim that it was the fact that Cogger told Kingsley about the suspension, but did not directly tell him or Brown, that was a reason for Cogger's discharge. "Jim Walberg was their supervisor, and now all of a sudden Brian Kingsley was their supervisor." Cogger "went behind our backs." "[H]e hid from David Brown and myself that he didn't have a drivers license. (Tr. 688–689.) There is no evidence that Cogger made any attempt to conceal the fact of his suspension from anyone. The record contains numerous examples of the service technicians treating Kingsley as their supervisor both during and after Walberg was employed. Coombe's veracity suffers greatly from the fact that this reason was not mentioned in the affidavit that he provided to the Board, nor is there any evidence that it was conveyed to anyone before Coombe testified at the hearing. I find Coombe's testimony to be incredible, and I find this reason to be yet another attempt by the Respondent to justify its unlawful conduct.

(3) The Therneau vehicle

This vehicle is apparently, "the Aztec with the noise in the differential," referenced by Brown as one of the reasons he recommended that Cogger be discharged. (Tr. 616.) Brown stated that Cogger erroneously replaced both of the vehicle's wheel bearings when the problem was the differential. Brown claims that this Cogger misdiagnosis caused the Respondent to pay $350 for one of the bearings. The customer paid for the other. Brown avers that it was because Cogger did not follow a simple procedure that caused the misdiagnosis. When asked "through your discussions with" Cogger how did you learn that he did not follow the procedure, Brown responded "per the writing on the back of the repair order." When asked if he communicated any of his concerns about Cogger's work on this vehicle to Cogger, he claims that when he heard the noise as he test drove the vehicle, he said to Cogger, "You couldn't hear this?" Brown makes no reference to any response by Cogger, nor did Brown have any idea when this incident occurred. Cogger credibly testified that he had no recollection of this vehicle.

There is no credible evidence to support the contention that this incident happened or that it was used as a reason for Cogger's discharge. The Respondent offers no reason for the absence of documentary evidence. In addition to Brown's abysmal testimonial demeanor, I find his statements inconceivable. If Cogger's failure to follow a basic procedure—Brown claims all Cogger had to do was "hook up electronic ears"—caused the unnecessary replacement of the parts it seems incongruous that the customer would be obliged to pay anything, let alone $350 for a needless wheel bearing. The record establishes that Brown issued Cogger a reprimand because he wrote on his timecard, and gave a reason that was incomprehensible to Brown. Yet Brown fails to even engage Cogger in an extended conversation about an incident that cost the Respondent $350 and a customer—Brown's testimony is simply unbelievable.

The Respondent's contention regarding the Eckert vehicle is similar to the foregoing. Brown testifies that Cogger did not properly affix foam between the brake and fuel lines to prevent noise and that Cogger did not tighten a loose rivet. The Respondent offers no documentation in support of Brown accusations, nor does Brown even provide a timeframe when this incident is alleged to have occurred. Apparently in anticipation of this accusation the General Counsel asked Cogger, on direct examination, if he had ever received any type of discipline for any work that was related to foam installation. Cogger credibly answered "No." It could be argued that his answer did not address the loose rivet. In that regard I am in complete agreement with the General Counsel's contention that it is hard to believe (I would say almost impossible) that conduct that did not warrant discipline when it occurred, without more, would later warrant discharge.

The same conclusion can be applied to Brown's laments that Cogger did not comply with Brown's requests to partake of training. Initialing I note that it is not contended that Brown ordered him to train, nor did Brown ever state that he specifically singled out Cogger about this problem. There is no evidence that Cogger was ever reprimanded in any manner. Accordingly, I discredit Brown testimony and find that the foregoing reasons are merely additional, feeble, attempts to disguise the Respondent's real reason for discharging Cogger.

The General Counsel also urges that I find Brown's testimony concerning training to be without merit because Brown admitted that at the end of November all the service technicians had reached 100 percent of the GM training requirements. I view Brown's statement as applying

to the training that was required by GM in order for the Respondent to obtain certain benefits from GM. It is possible that there might have been other training available, although not the kind that would generate benefits from GM. The foregoing conclusion should not be construed as an endorsement of Brown's veracity.

In its brief the Respondent mentions that Brown found wheel speed sensors, after Cogger was discharged, in his work area. The Respondent does not appear to seriously argue that this fact, readily acknowledged and explained by Cogger, had any impact on his unlawful discharge. In any case I find that it obviously has no relevance to Cogger's discharge.

Based on the foregoing findings, as well as the record as a whole, I find that the Respondent's discharge of Cogger violated Section 8(a)(1), (3), and (4) of the Act, as alleged in the complaint.

3. Robert Anderson

Anderson worked as a service technician for the Respondent from May 1 until his discharge on January 5, 2007. Before being hired as a service technician by the Respondent Anderson was employed in the same capacity for 20 years by Swanson Motors. His job duties for both employers included automotive repairs, driveability and electrical concerns, and automatic transmissions. Anderson testified that Kingsley was his immediate supervisor during his employment by the Respondent.

Late in the afternoon on January 5 Brown told Anderson to report to Coombe. Brown was in the office when Anderson arrived. Coombe gave Anderson the CSI memo and a CSI graph. (GC Exh. 13.) In answer to Coombe's questions, Anderson acknowledged that he remembered the memo and that Coombe had told him that anyone whose scores were below the zone average could be terminated. Coombe then concluded, "I'm going to have to let you go for what you are doing to this place." There is no dispute that only Coombe spoke and the meeting ended when he finished speaking.

Coombe claims that he added something about attitude and performance. Brown "believes" Coombe said something about a "bad attitude." Coombe admitted that in his affidavit that he gave to the Board on February 1, 2007, he stated "I told Anderson that his SSI scores were not satisfactory and that it was time to end our relationship." (Tr. 37, 43.) Coombe testified that in the presence of his counsel he read and signed the affidavit.

I fully credit Anderson's testimony. I have more confidence in his truthfulness than that of any other witness. His testimonial demeanor was exemplary. He readily accepted responsibility for his actions and always testified in an open and candid manner without reservation. In addition, the General Counsel has also offered a document the Respondent submitted to the Minnesota Department of Employment and Economic Development that clearly states that his low CSI scores were the reason for his discharge. The document and the wording used by the Respondent is similar to the documents sent to the State regarding the discharges of Ossefoort and Cogger. (See GC Exhs. 10(d), 55, and 89.)

a. Anderson's CSI scores

Anderson testified that during December Brown handed him a bar graph of his CSI scores and told him that the scores were below the zone average and "we needed them up." (Tr. 408, GC Exh. 53.) Anderson asked if he was being given his "walking papers." Brown replied that he thought that Anderson performed a more thorough diagnosis than the other service technicians and that he "didn't know but he didn't think there was a problem." On January 2, Anderson met with Coombe and Brown regarding his CSI scores. He was presented with the same graph and they reiterated that his scores were low. When asked if there was anything he could do to improve them Anderson said "the only thing I could think of was to try and fix the car the best way I possibly could." Anderson testified that Coombe's only comment was to tell Anderson that if he had any ideas how to improve his scores to tell them at any time. Anderson asked Brown if he did not think that all the work that Brown performed was "the best I can do to help the customer." Brown said "evidently these people don't think so." Anderson specifically did not recall any mention of communications or parts being ordered incorrectly.

The General Counsel argues, as she did with Ossefoort and Cogger, that the Respondent discharged Anderson only a month after it implemented the CSI policy and that it did not yet know if his scores had improved during that period. The sample seize of Anderson's survey is even smaller than those of Ossefoort or Cogger. Only 29.4 percent of those customers surveyed returned the 3-month surveys and only 34.1 percent returned the 12-month survey. (GC Exh. 14 at 53.)

Additionally, like Ossefoort and Cogger, Anderson's scores are far from unsatisfactory. His 3-month "percent of all service concerns corrected' score is 100 percent and his 12-month score is 92.9 percent. (GC Exh. 14 at 53.) Both are above the zone average. (GC Exh. 14 at 37.) His 3-month "fixed right this service visit" score is above the zone average at 3.75, although his 12-month score is below the zone average it is still between "completely and very satisfied." (GC Exh. 14 at 53, 50, and 55.) For the "overall dealership visit" question, his 3-month score was identical to the zone average and his 12-month score was between "completely and very satisfied." (GC Exh. 14 at 53, 50, and 55.)

In view of the foregoing, as well as the earlier finding that only a month before the Respondent violated Section 8(a)(1) of the Act by threatening to discharge Anderson if he decided to "go the union way," I find that the Respondent's reliance on the CSI scores as the reason for Anderson's discharge is a pretext. I find that the Respondent's true motivation for discharging Cogger was his union and protective activities as well as his participation in the Board's processes by his giving testimony in the *Eichorn I* hearing in November 2006. I am also cognizant that the Respondent believed that Anderson was the "ramrod" behind the Union. *Eichorn I*, JD slip op. at 10.

b. Reasons advanced at the hearing for Anderson's discharge

(1) Swanson reports

On November 7, 2002, Anderson was given a 2-day suspension for willful damage to a repair order. "Failure to improve" will result in another suspension. Anderson's signature is on the warning and he admitted receiving it. (R. Exh. 8.)

A warning report dated December 2, 2003, describes an incident where Anderson damaged several trim pieces while repairing a vehicle. The action to be taken is a 3-day suspension, but the exact days are not specified. The report indicates that the incident happened on November 21, 2003. (R. Exh. 7.)

On May 18, 2005, Anderson was given a warning report and a 3-day suspension for spinning his wheels as he exited the parking area. This conduct caused rocks and gravel to fly about, damaging employees' cars. The box labeled "dismissal" is marked as a consequence of a recurrence. (R. Exh. 6.)

On April 7, 2006, Anderson was issued a warning report for carelessness and bad attitude. On three occasions he got the headliners and sun visor dirty when he was working inside the vehicle. The incident occurred on March 29, 2006. Anderson was suspended for 3-days and the consequence for a failing to improve is dismissal. (R. Exh. 5.)

Discussion

The General Counsel objected to the admission of the foregoing warnings based on relevance. The warning allegedly prepared on December 2, 2003, is especially troubling in that regard, a fact I commented on at the hearing. Anderson remembered the incident but did not recall being suspended or discussing the incident with Walberg. The warning is unsigned. Walberg testified immediately after Anderson. Walberg was not questioned about this, or any of the employee warning reports he signed. Thus, the record stands with Anderson, a totally credible witness, having no recall of the document, no recall of being suspended, and no recall that Walberg ever talked to him about the matter. Accordingly, I find that this document has no probative value.

Anderson forthrightly acknowledged the other warnings as part of his employment history with Swanson. It is a quantum leap from that acknowledgement to a finding that those warnings played any part in the Respondent's decision to discharge Anderson.

Brown testified that it was probably in August, shortly after being hired, that he went through the technicians service files. (Tr. 567, 588.) He provides no more details. Brown did not testify that any of the "Swanson" reprimands were in Anderson's file, or were seen by Brown when he "went through technicians service files."

Of even greater significance is the total lack of evidence that any of the discipline was specifically cited as a reason for Anderson's discharge. Moreover, before he was hired Anderson was interviewed by Coombe and Justin Eichorn, the Respondent's president. Nothing was said about any past disciplinary action. Certainly with a 20-year work history at Swanson, Anderson had to be viewed by Walberg as at least a satisfactory employee. The record contains evidence that M. Eichorn shared that view. As found above, less than a month before Anderson was discharged, M. Eichorn told him that he wanted Anderson to work for him. The reason he gave was because he knew that Anderson "could fix cars." In furtherance of that objective M. Eichorn said that he was going to offer Anderson a contract that would be far better than that which the Union could obtain for him. Brown also appears to view Anderson's continued employment as

an asset. Thus, Brown does not deny that when Anderson asked him if he (Anderson) was about to be discharged Brown said that he did not believe that was the case. He explained, that he thought that was because Anderson was more thorough than the other service technicians. (Tr. 408.)

Based on the foregoing I find that the warnings issued to Anderson set forth above, had no part in the Respondent's decision to discharge him and furthermore I find any suggestion to the contrary is additional evidence of pretextual nature of the Respondent's discharge of Anderson. See *Metropolitan Transportation Services,* 351 NLRB No. 43, slip op. 2–3 (2007) (Board adopts ALJ's finding that a month old reprimand is "stale").

(2) The June 12, 2006 employee warning report

On June 12, 2006, Walberg gave Anderson a 2-day suspension for carelessness. Anderson twice improperly installed a windshield bracket. The second time he damaged the windshield. The consequence for failing to improve is either suspension or dismissal. Anderson admitted the conduct although he does not recall being shown the warning or refusing to sign it. Brown became aware of this discipline in August. Neither Brown nor Coombe testified that this incident was a reason for Anderson's discharge.

(3) The Trebs vehicle

Anderson testified that he ordered and installed a complete axle housing for the Trebs vehicle in June. Anderson believed that the complete axle housing included a bearing. He did not notice that there was no bearing when he installed the housing. In the fall the customer discovered that the bearing was missing. The Respondent paid for the repair. Anderson credibly testified that when Brown asked him what happened Anderson told him that he ordered and installed a "complete axle housing." He was never told by the parts department that a "complete axle housing" did not include a bearing. Anderson admitted that he did not notice that the bearing was missing. Anderson specifically denied that Brown opined that Anderson had perform incompetently, and Brown did not testify to the contrary. The record discloses no evidence of any negative action being taken against Anderson for this incident. To the extent that the Respondent is claiming this incident was a reason for Anderson's discharge, I find that it is pretext.

(4) The Lutheran Social Services vehicle

The Respondent relies on two incidents concerning this vehicle to justify Anderson's discharge. The Respondent also claimed that the repair work on this vehicle was connected with Ossefoort's discharge, a claim that was rejected. (See 1.i.(2) above.) The Respondent contends that on January 5, Anderson failed to repair this vehicle and, had Brown not sent word to Anderson to check the wiring, the customer would have had to return. Anderson credibly testified that he pulled the code, checked the wheel speed sensor, and did a test drive but was unable to duplicate the problem. Anderson credibly testified that he repaired the problem after Kingsly told him that Ossefoort had previously worked on the vehicle and discovered that the problem was with a wire located under a metal cover. Anderson testified that had he known this in the beginning he would have located and repaired the problem wire initially. Anderson

credibly testified that he was never told that anyone was dissatisfied with his work on this vehicle. Brown claims that Anderson should have known about Ossefoort's work because Ossefoort's comments were written on the repair order. Anderson credibly denied having seen the previous repair order, and denied that it was the practice for the service technicians to have a vehicle's prior repair orders. I credit Anderson's testimony. I also note that the repair order that Brown claims had Ossefoort's comments written on it is not in evidence. I find this claim by the Respondent to be a pretext.

Brown's other criticism concerning this vehicle involves the installation of a water, or heat, pump. Brown claims that Anderson reported to him that a new pump that Anderson installed did not work, and that another needed to be ordered. Brown told Anderson "why don't you run a jumper wire to the pump?' So I stood there and he hooked the wires up to the pump. I put my hand on the pump. I says, 'the pump's running, Bob. What do you want to do now?' I says, 'You wired it wrong.'" Brown also contends that even if Anderson was not responsible for wiring the pump incorrectly, he should have known to check the polarity. Brown claims that he completed a warning based on Anderson's work on this vehicle.

Anderson claims that it was a heat pump he installed, and that he went and got Brown and told him that he thought a new pump was needed. Anderson testified that he showed Brown "how I tested it out and how I had power to everything. Then I decided to wire the pump itself, and we found out that the pump would run." Anderson testified that Brown was present when he hot wired the pump, but not when he ascertained that the polarity had been incorrectly installed at the factory. Anderson went to Brown and explained the problem, and told him that it was fixed. Anderson did not remember if Brown responded. Anderson credibly testified that he never received any type of warning or discipline for his work on this vehicle.

The General Counsel argues that Brown's testimony should be discredited because the alleged reprimand was not provided pursuant to a subpoena that requested all of the disciplines. Coombe testified that the Respondent had fully complied with the subpoena. I agree. I also find Brown's testimony to be incredible. In addition to his poor demeanor, I find it improbable that Anderson, a service technician who had worked for the same employer for 20 years, would not have the experience or competence to perform the simple test that Brown described. I also find Brown's testimony inconsistent with his comments, made less than a month before, commending Anderson for his thoroughness. I find this is another pretext, offered by the Respondent in an attempt to hide the unlawful reason for Anderson's discharge.

(5) Moonlighting and attitude

On cross-examination Anderson admitted that during his employment by the Respondent he had been paid by his friends to repair their vehicles at his home. The Respondent argues that the foregoing activity is an independent basis to terminate Anderson. I disagree. There is no evidence when the Respondent learned of this activity. The Respondent offered evidence that it had a specific prohibition against this activity, or that discharge was a mandatory penalty. Indeed the only record evidence is the written warning given to Ossefoort for repairing vehicles, in the shop, for pay, a distinguishing factor. The only reference to discharge in the warning is that it is grounds for dismissal per the union contract. (R. Exh. 2.) Yet another distinguishing factor. Moreover, even if this conduct might have constituted a legitimate cause for discharge,

> an employer cannot carry its burden of persuasion by merely showing that it has a legitimate reason for imposing discipline against an employee, since the policy and protection provided by the Act does not allow the employer to substitute 'good' reasons for 'real' reasons. The mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination.

Multi-Ad Services, 331 NLRB 1226, 1239 (2000), enfd. 255 F.3d 363 (7th Cir. 2001) (internal quotes and case citations omitted).

"Attitude" was not the first word out of Brown's mouth when giving reasons for Anderson's discharge. Initially he claimed that he recommended Anderson's termination because of Anderson's work performance, and descending CSI scores. Brown stated that the reason the termination occurred on January 5 was that the "final straw" was the improper repairs and poor diagnosis concerning the Lutheran Social Services vehicle. In addition to finding those reasons pretextual, I would add that Brown's "final straw" comment is in direct contradiction to the information he provided to the State of Minnesota. In response to the question "What was the final incident," Taylor wrote—at Brown's direction, "Receiving Dec General Motors scores." (GC Exh. 89 section B4.)

When the Respondent's counsel asked if those were all the reasons, Brown added "work quality and attitude and teamwork. And he [Anderson] did complain to me earlier about having to help Wade on a transmission, and he wasn't happy about that." I have searched the transcript and aside from this one sentence I have found no connection between Anderson and, presumably, Eckert. I simple cannot accept that Brown honestly believes that this alleged moment of unguarded unhappiness is a legitimate reason to terminate an employee with 20 years of experience. An employee who was praised by Brown only a month before and assured by Brown that his job was not in jeopardy. I find the extent of Brown's mendacity extraordinary. There seems to be nothing that he would not say in furtherance of the Respondent's cause or to denigrate the discriminatees. I find his testimony to be untrustworthy and I find that all the reasons proffered for Anderson's discharge are pretextual.

Accordingly, based on the foregoing findings, as well as the record as a whole, I find that the Respondent's discharge of Anderson violated Section 8(a)(1), (3), and (4) of the Act, as alleged in the complaint.

H. A Systematic Pattern of Retaliation

Paragraph 6(a) of the complaint alleges that since about August 21, 2006, the Respondent began systematically issuing discipline to employees Jim Ossefoort and Dave Cogger.

In support of this allegation the General Counsel submits that regardless of the circumstances of each individual discipline, the overwhelming evidence establishes that the disciplines violate Section 8(a)(3) and (4). First, argues the General Counsel, is the copious direct evidence of the Respondent's animus towards the service technicians' union activity clearly established in *Eichorn I,* and here, supports a finding that the Respondent's pattern of issuing discipline was unlawful.

The General Counsel points to the Respondent's lack of investigation prior to issuing disciplines as illustrative of an unlawful motive. In support of that contention the General Counsel stresses that of the nine disciplines issued to Ossefoort and Cogger between August 21 and January 15, the Respondent informed Ossefoort of only two and Cogger one. Obviously, the failure to inform the employees of the disciplines prevented them from defending themselves. Under the appropriate circumstances, which are present here, the failure to inform is an indicia of discriminatory intent. E.g., *All Pro Vending,* 350 NLRB No. 46, slip op. at 8–9 (2007).

The General Counsel next cites Brown's attempt to explain his failure to inform Ossefoort and Cogger about the majority of their disciplines by stating that he used the employee warning reports for documentation which, argues the General Counsel, suggests that the reports are not disciplinary. Conversely, Brown testified that when he informs an employee about an employee warning report and has the employee sign the report, it is discipline, because an unsatisfied customer is involved. Brown's testimony is not supported by the documentary evidence. Thus, General Counsel Exhibits 64, 68, 71–73, 76, 77, and 78, refer to customers but are not signed by the employees. Contrarily, General Counsel Exhibits 61, 62, 70, and 74 are not customer related but are signed by the employees. The General Counsel concludes that Brown's testimony is confused, inconsistent, and supportive of a conclusion that the Respondent's issuance of the disciplines violates the Act. As set forth above, I have found Brown and Coombe not to be truthful witnesses. In that regard I have found that all of the disciplines, except the warning issued to Ossefoort for failing to replace the hubcaps, are unlawful pretexts.

In addition, the General Counsel maintains that the timing of the disciplines supports a conclusion that all of the discipline issued demonstrates a pattern of 8(a)(3) and (4) conduct. In that regard the General Counsel observes that save for the discipline issued to Ossefoort on August 21, the remaining disciplines were dated November 8 or after, only 6 days before the hearing in *Eichorn I* and the bannering began. Further evidence of this pattern is found in the Respondent's repeated efforts to show that Ossefoort, Cogger, and Anderson were terrible employees throughout their employment. Yet there were no warnings issued by the Respondent in July, September, or October to these alleged terrible employees. The General Counsel is even suspicious of the timing of the August 21 warning to Ossefoort. In that regard the General Counsel notes that Ossefoort bore the brunt of the Respondent's August assault on union activity. Thus, Ossefoort was the recipient of four of the six 8(a)(1) violations Judge Bogas found the Respondent committed in August. The General Counsel also observes that 8 of 12 employee warning reports issued to nonunion employees were issued after the discriminatees were discharged. The General Counsel contends, therefore, that warning reports should not be considered as evidence that the Respondent treated union supporters the same as nonunion employees. Accordingly, the General Counsel argues, the animus, failure to investigate, and suspect timing suggests an unlawful motive and that the Respondent issued the disciplines in an effort to justify its upcoming unlawful termination of Ossefoort and Cogger. "Thus, in General Counsel's view, the timing of the warnings supports a conclusion that the Respondent's pattern of discipline is a violation of the Act."

As set forth above regarding Ossefoort's failure to replace the hubcaps, the "timing" was dictated by Ossefoort's mishap, and not the Respondent. Regarding the 8(a)(4) allegations, regardless of how close to the hearing date warnings are issued, there must be some evidence of the Respondent's knowledge, or evidence from which a reasonable inference can be drawn, that the Respondent knew of the discriminatees involvement in the Board's proceedings. As set forth

above, I have found that the Respondent was aware that the discriminatees gave testimony in the Board's hearing on November 14. Accordingly, I have found that any unlawful action taken against the discriminatees after that date was taken not only because of their union activities, but because they participated in the Board processes.

I am somewhat perplexed by the General Counsel's argument. A *Wright Line* analysis has been applied to each individual's discipline and discharge, all the while keeping in mind the totally of the circumstances. To the extent that the General Counsel is suggesting, as the Board stated in *Embassy Vacation Resorts,* 340 NLRB 846, 848 (2003), that an employer's "unlawful disciplinary action against one prounion employee based on antiunion animus helps to support the inference that the same animus motivated its actions against other prounion employees," I fully agree. The record establishes, and I have found, that the General Counsel has presented an overwhelming case. Any additional findings would be cumulative. Moreover, such a finding would not remove the need for a *Wright Line* analysis for each alleged violation of Section 8(a)(3) and (4). *Consolidated Biscuit Co.,* 346 NLRB 1175, 1177 fn. 17 (2006). To the extent that the General Counsel may be urging an independent violation premised on the Respondent's conduct, I am unaware of any precedent for such a finding and, in any case, it would have no material impact on the remedy.

I. The Turkey Gift Certificates

In December, the Respondent had 20 gift certificates remaining from a November promotion. Coombe gave every sales and business department employee a gift certificate except Donald Conrad, whom Coombe considered a service department employee. Conrad testified in *Eichorn I*. Judge Bogas found that Conrad was a "yard man" who worked in the sales department. His position was never considered a "union job." Judge Bogas found that Coombe violated Section 8(a)(1) by interrogating Conrad about receiving a subpoena to testify in *Eichorn I*.

In mid-December, Coombe gave the remaining gift certificates to Brown for distribution. Brown admitted that the only service department employees that were not given gift certificates were Ossefoort, Cogger, Anderson, and a part-time employee who was absent when Brown gave out the certificates. Brown claims that he gave the certificates to the two-lowest paid service department employees.

Ossefoort testified that in late December he was talking to Brown in Brown's office when the Union was mentioned. Ossefoort opined how it was cheap of the Respondent not to give "us" gift certificates or invitations to the holiday party. Ossefoort credibly testified that Brown replied, "what did we expect after we pissed all over Mr. Coombe in the courtroom." Brown stated that he "thought" he gave a response but did not remember.

The Respondent argues that there is no evidence to establish that the Respondent intentionally chose not to give the gift certificates to Ossefoort, Cogger, Anderson, and Conrad. I disagree. I find, based on Ossefoort's credible and unrebutted testimony, that the reason the four employees did not receive the turkey gift certificates was because they testified on behalf of the General Counsel at the hearing in *Eichorn I*. I further find that the Respondent was also motivated by the service technicians' union and protected activities.

Accordingly, I find that the Respondent violated section 8(a)(1), (3), and (4) of the Act when it refused to give turkey gift certificates to Ossefoort, Cogger, and Anderson because they testified at the Board hearing and because they engaged in union and protected concerted activity. I also find that the Respondent violated Section 8(a)(1) and (4) of the Act when it refused to give a turkey gift certificate to Conrad because he testified at the Board hearing.

J. The 8(a)(5) Discharges

The General Counsel contends that the discharges of Ossefoort, Cogger, and Anderson also violate Section 8(a)(1) and (5) because they were admittedly discharged, at least in part, pursuant to the Respondent's unlawful, unilaterally implemented CSI policy. There is no question that the Respondent unilaterally implemented a CSI policy on November 29, under which it could terminate employees for below average CSI scores. It is undisputed that neither the Respondent nor Swanson had any such policy.

The General Counsel contends that the test for whether a discharge violates Section 8(a)(5) is whether the employers unlawfully implemented rule or policy was a factor in the discipline or discharge. The General Counsel also observes that an employer may avoid having to reinstate and pay backpay to employees discharged pursuant to an unlawfully instituted rule or policy if the employer demonstrates that it would have discharged the employees even absent that rule or policy. Here it is unnecessary to leave the remedy to compliance because the circumstances surrounding the employees discharges already have been fully litigated. The General Counsel relies on *Great Western Produce,* 299 NLRB 1004 (1990) for the foregoing principles.

After the General Counsel made the foregoing argument the Board issued *Anheuser-Busch, Inc.,* 351 NLRB No. 40 (2007). That case overruled *Great Western* to the extent that *Great Western* held "that an employer may not discipline employees for uncontested misconduct if that misconduct is detected through unilaterally, and unlawfully implemented means." Id., slip op. at 4. In *Anheuser-Busch,* a Board majority (Chairman Battista and Members Schauamber and Kirsanow; Members Liebman and Walsh dissenting), concluded that Section 10(c)'s prohibition of a make-whole remedy where discipline is "for cause" precluded a make-whole remedy on the facts of that case. It is noted that there are currently only two members on the Board, Members Liebman and Schauamber. Regardless, I am bound by the majority view because it has not been reversed by the Supreme Court or the Board itself. E.g., *Carney Hospital,* 350 NLRB No. 56, slip op. at 13 (2007). The employer's unlawful unilateral change in *Anheuser-Busch* was to its method for detecting drug use. Drug use continued to be the "cause" for the discipline and the discipline remained the same. In discussing *Great Western,* the Board adopted, as the law of the case, the U.S. Court of Appeals for the D.C. Circuit's interpretation that the unlawful change in *Anheuser-Busch,* like those in *Great Western,* did not involve changes in the employer's misconduct standards but rather involved changes in the employer's methods for detecting misconduct. Here, by contrast, the Respondent unilaterally implemented a policy where none had existed, unilaterally defined the "cause" for discipline (below zone average scores), and unilaterally determined the penalty (discharge). There can be no question that the conduct for which the employees were discharged, low CSI scores, did not exist as a transgression prior to the Respondent's unlawful unilateral implementation of the CSI/SSI

policy. Moreover, the predicate for the disciplinary action, the CSI scores, are most certainly contested.

The dissent in *Anheuser-Busch* claims that "discipline imposed pursuant to an unlawful unilateral change is doubly destructive: it damages both the affected employees and the union's status as bargaining representative." The majority rejects that claim because "[r]easonable employees would not be surprised if coworkers were discharged or suspended for using illegal drugs at work, sleeping on duty or urinating off of their employer's roof, and could hardly fault their union if such discipline occurred." *Anheuser-Busch,* slip op. at 6 fn. 19.

It is apparent that the Board's observation is not applicable here. I find for all the foregoing reasons that the Respondent has violated the Act as alleged in the complaint. *Uniserv,* 351 NLRB No. 86 (2007). Accordingly, I find that Ossefoort, Cogger, and Anderson were discharged, in part, pursuant to the Respondent's unlawfully implemented CSI policy and that the Respondent violated Section 8(a)(1) and (5) of the Act as alleged in the complaint.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has interfered with the employees' exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act by:

(a) Threatening its employees that the employees will not be paid for the Thanksgiving holiday if the employees wish to be paid the Union way.

(b) Threatening an employee that the employee had to choose the Union way or the Eichorn way.

(c) Threatening to discharge an employee if the employee continued to support the Union.

(d) Promising to grant an employee improved terms and conditions of employment if the employee rejected the Union as the employee's bargaining representative.

(e) Threatening an employee by telling the employee that the employee's lawful union activity showed that the employee was going the Union way.

(f) Telling an employee that it would be futile for the employee to select the Union as the employee's bargaining representative by threatening the employee that the Union might win the battle but is not going to win the war.

(g) Threatening an employee by telling the employee that the Respondent wants team players, thereby indicating that being a union supporter is inconsistent with employment by the Respondent .

4. By disciplining and discharging employees James Ossefoort, David Cogger, and Robert Anderson, because of their union and protected concerted activities and their participation in the Board's processes, the Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

5. By refusing to give employees James Ossefoort, David Cogger, and Robert Anderson, gift certificates because of their union and protected concerted activities and their participation in the Board's processes, the Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

6. By refusing to give employee Donald Conrad a gift certificate because he participated in the Board's processes, the Respondent has violated Section 8(a)(1) and (4) of the Act.

7. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time automobile mechanics, parts-men, washers, polishers, and new/used car prep employees employed by Eichorn Motors, Inc., at its Grand Rapids, Minnesota facility; excluding shop foreman, superintendents, office help, salesmen, guards and supervisors as defined in the National Labor Relations Act, as amended.

8. Since about May 1, 2006, based on Section 9(a) of the Act the Union has been the exclusive collective-bargaining representative of the Respondent's employees in the unit described above.

9. At all material times, the Union has requested that the Respondent recognize it as the exclusive collective-bargaining representative of the unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.

10. By engaging in the following conduct, since on or about July 23, 2006, the Respondent has committed unfair labor practices contrary to Section 8(a)(5) and (1) of the Act.

(a) Bypassing the Union and dealing directly with unit employees.

(b) Unilaterally altering its wage policy without first giving notice to the Union and opportunity to bargain about the matter.

(c) Unilaterally changing its holiday pay policy without first giving notice to the Union and opportunity to bargain about the matter.

(d) Unilaterally changing its training pay policy to eliminate paying double time for training without first giving notice to the Union and opportunity to bargain about the matter.

(e) Unilaterally implementing a customer service index/service satisfaction index (CSI/SSI) policy under which unit employees may be discharged for failing to reach zone

average CSI/SSI scores without first giving notice to the Union and opportunity to bargain about the matter.

(f) Discharging employees James Ossefoort, David Cogger, and Robert Anderson, based on its unlawful, unilaterally implemented CSI/SSI policy.

11. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

12. The Respondent has not violated the Act except as set forth above.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged James Ossefoort, David Cogger, and Robert Anderson based on its unilaterally implemented CSI/SSI policy, as well as discriminatorily discharging those employees because of their union and protected concerted activity and for their participation in the Board's processes, my recommended Order requires the Respondent to offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. My recommended Order further requires that the Respondent make the above-named employees whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharges to the date the Respondent makes proper offers of reinstatement to them, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). My recommend Order also orders that the Respondent make Donald Conrad whole for the Respondent's refusal to give him a gift certificate because of his participation in the Board's processes.

I shall further recommend a broad order because the Respondent's egregious misconduct demonstrates a general disregard for employees' statutory rights. *Hickmott Foods,* 242 NLRB 1357 (1979).

I have considered the totality of the circumstances and I find that the Respondent's behavior manifests "an attitude of opposition to the purposes of the Act to protect the rights of employees generally, which would provide an objective basis for enjoining a reasonably anticipated future threat to any of those Section 7 rights." *Five Star Mfg.,* 348 NLRB No. 94, slip op. at 2 (2006) (internal quotation marks and citation omitted.)

In *Eichorn I,* Judge Bogas found that the Respondent violated Section 8(a)(1) of Act by: threatening to discharge employees because they supported the Union; promising improved terms and conditions of employment to unit employees if they abandoned the Union; engaging in coercive interrogations of unit employees; creating the impression that the employees' protected concerted activities were under surveillance; and coercively soliciting a unit employee to campaign against continued union representation. Additionally, Judge Bogas found that the

Respondent violated Section 8(a)(5) by: bypassing the Union and dealing directly with unit employees regarding terms and conditions of employment and failing and refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees.

I find it significant that the Respondent not only has a proclivity to violate the Act but it clearly choose the path of recidivism even before the hearing in *Eichorn I* opened on November 14, 2006. Thus, as set forth above, in August the Respondent made an unlawful unilateral change to the employee's wage policy and unlawfully reprimanded Ossefoort, one of only three active union supporters. On the day before, and the day after the Board hearing started, the Respondent unlawfully disciplined Ossefoort and Cogger, two of the three active union supporters and two of four employees who testified on behalf of the General Counsel at the hearing in *Eichorn I*.

I too have found that the Respondent has threatened union supporters with discharge for supporting the Union and promised a union supporter improved terms and conditions of employment if he, and his fellow union supporters, abandoned the Union. The Respondent has unlawfully disciplined and discharged the three active union supporters because of their support for the Union and because they testified at the Board hearing in *Eichorn I* and otherwise participated in the Board's processes. The Respondent has unlawfully withheld benefits from employees because of their union support and/or giving testimony at the *Eichorn I* hearing. The Respondent has bypassed the Union and dealt directly with unit employees regarding terms and conditions of employment. The Respondent has failed and refused to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees by unilaterally changing the terms and conditions of employment and using an unlawfully implemented policy (CSI/SSI policy), as one of its numerous pretextual reasons for discharging the three known active union supporters.

The Respondent is a brazen recidivist and egregious violator that has clearly demonstrated a general disregard for its employees' fundamental rights. The active union supporters are few. The violations are numerous and were committed by three of four high level officials. Clearly, General Manager Michael Coombe developed, orchestrated and participated in the Respondent's wide-ranging assault on its employees' Section 7 rights.

Accordingly, I recommend, as urged by the General Counsel, that the Respondent assemble all of the employees employed at its facility, during worktime, and have General Manager Michael Coombe read the attached notice to the employees. The reading will ensure that the information contained in the notice is disseminated to the employees and it will reassure them that their Section 7 rights will be protected in the future. Most importantly, the reading of the notice aloud to the employees "will enable them to fully perceive that the Respondent and its managers are bound by the requirements of the Act." In this regard, if General Manager Michael Coombe is unable, or unwilling to read the notice aloud, I recommend that it be read by a Board agent in the presence of Coombe, David Brown, and Mitchell, and Justin Eichorn. *Homer D. Bronson Co.,* 349 NLRB No. 50, slip op. at 4 (2007) (and cited cases).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Eichorn Motors, Inc., Grand Rapids, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees that they will not receive holiday pay if they wish to be paid the Union way.

(b) Threatening its employees that the employees have to choose the Union way or the Eichorn way.

(c) Threatening to discharge employees if the employees continue to support the Union.

(d) Promising to grant employees improved terms and conditions of employment if the employees reject the Union as the employees' bargaining representative.

(e) Threatening employees by telling the employees that the employees' lawful union activity showed that the employees were going the Union way.

(f) Telling employees that it would be futile for the employees to select the Union as the employees' bargaining representative by threatening the employees that the Union might win the battle but is not going to win the war.

(g) Threatening employees by telling the employees that the Respondent wants team players, thereby indicating that being a union supporter is inconsistent with employment by the Respondent.

(h) Refusing to grant benefits to employees because the employees engaged in union or protected concerted activity, or participated in the Board's processes.

(i) Disciplining, discharging, or otherwise discriminating against any of its employees based on the Respondent's unlawful unilateral implementation of the CSI/SSI policy, or because they engaged in union or other protected concerted activities, or participated in the Board's processes.

(j) Bypassing the Union and dealing directly with unit employees regarding terms and conditions of employment.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(k) Unilaterally changing the terms and conditions of employment for unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with respect to those changes.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer James Ossefoort, David Cogger, and Robert Anderson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make James Ossefoort, David Cogger, Robert Anderson, and Donald Conrad whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful action against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful disciplines and discharges, and within 3 days thereafter notify James Ossefoort, David Cogger, and Robert Anderson in writing that this has been done and that the unlawful disciplines and discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) On request of the Union, rescind the unlawful unilateral changes to unit employees' wage, holiday, and training pay policies, and rescind the CSI/SSI policy.

(f) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

> All full-time and regular part-time automobile mechanics, parts-men, washers, polishers, and new/used car prep employees employed by Eichorn Motors, Inc., at its Grand Rapids, Minnesota facility; excluding shop foreman, superintendents, office help, salesmen, guards and supervisors as defined in the National Labor Relations Act, as amended.

(g) Within 14 days after service by the Region, post at its facility in Grand Rapids, Minnesota, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice

Continued

provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The notice shall also be read in the presence of all employees by General Manager Michael Coombe. If General Manager Michael Coombe is unwilling, or unable, to read the notice it shall be read by a Board agent in the presence of Coombe, David Brown, and Mitchell, and Justin Eichorn. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2006.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(i) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 5, 2008

_____
John T. Clark
Administrative Law Judge

_____
reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you by telling you that you will not receive holiday pay if you wish to be paid the Union way.

WE WILL NOT threaten you by telling you that you will have to choose the Union way or the Eichorn way.

WE WILL NOT threaten you with discharge or other adverse action because you support the Union or engage in other conduct protected by Section 7 of the National Labor Relations Act.

WE WILL NOT promise to grant you improved terms and/or conditions of employment if you reject the Union as your bargaining representative.

WE WILL NOT threaten you by telling you that engaging in lawful union activity shows that you are going the Union way.

WE WILL NOT tell you that it would be futile for you to select the Union as your bargaining representative by telling you that the Union might win the battle but is not going to win the war.

WE WILL NOT threaten you by telling you that we want team players, thereby indicating that being a union supporter is inconsistent with employment by Eichorn Motors.

WE WILL NOT refuse to grant you benefits because you engage in union or protected concerted activity, or participate in the National Labor Relations Board's processes.

WE WILL NOT discipline, discharge, or otherwise discriminate against you based on our unlawful unilateral implementation of the CSI/SSI policy, or because you engage in union or other protected concerted activities, or participated in the National Labor Relations Board's processes.

WE WILL NOT bypass the Union and deal directly with you regarding terms and conditions of employment.

WE WILL NOT unilaterally change your terms and conditions of employment including our wage, holiday, and training pay policies, and we WILL NOT implement any new policy concerning your

terms and conditions of employment, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to those changes.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer James Ossefoort, David Cogger, and Robert Anderson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make James Ossefoort, David Cogger, Robert Anderson, and Donald Conrad whole for any loss of earnings and other benefits suffered as a result of our unlawful action against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplines and discharges, and within 3 days thereafter notify James Ossefoort, David Cogger, and Robert Anderson in writing that this has been done and that the unlawful disciplines and discharges will not be used against them in any way.

WE WILL, on request of the Union, rescind the unlawful unilateral changes made to our wage, holiday, and training pay policies, and rescind the CSI/SSI policy.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

> All full-time and regular part-time automobile mechanics, parts-men, washers, polishers, and new/used car prep employees employed by Eichorn Motors, Inc., at its Grand Rapids, Minnesota facility; excluding shop foreman, superintendents, office help, salesmen, guards and supervisors as defined in the National Labor Relations Act, as amended.

EICHORN MOTORS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

330 South Second Avenue, Towle Building, Suite 790
Minneapolis, Minnesota 55401-2221
Hours: 8 a.m. to 4:30 p.m.

612-348-1757.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 612-348-1770.